No. 99-8576-CFH Title: Paul L. Glover, Petitioner
v.
United States

Docketed: March 10, 2000 Court: United States Court of Appeals for the Seventh Circuit

Entry	Date	Proceedings and Orders
	Dec 15 1999	Application (99A510) to extend the time to file a petition for a writ of certiorari from January 5, 2000 to March 5, 2000, submitted to Justice Stevens.
	Dec 16 1999	Application (99A510) granted by Justice Stevens extending the time to file until March 5, 2000.
	Mar 6 2000	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due May 24, 2000)
	Apr 7 2000	Order extending time to file response to petition until May 10, 2000.
	Apr 10 2000	Brief amicus curiae of Families Against Mandatory Minimums Foundation filed.
	May 9 2000	Order further extending time to file response to petition until May 24, 2000.
	May 22 2000	Brief of respondent United States in opposition filed.
	Jun 2 2000	Reply brief of petitioner Paul L. Glover filed.
	Jun 7 2000	DISTRIBUTED for Conference of June 22, 2000
	Jun 26 2000	Petition GRANTED. SET FOR ARGUMENT November 27, 2000. **********
	Jul 18 2000	Order extending time to file petitioner's brief on the merits to and including August 28, 2000.
	Aug 28 2000	Brief amici curiae of National Association of Criminal Defense Lawyers, et al. filed.
	Aug 28 2000	Joint appendix filed.
	Aug 28 2000	Brief of petitioner Paul L. Glover filed.
	Sep 27 2000	Brief of respondent United States filed.
	Oct 10 2000	Record filed.
	Oct 24 2000	CIRCULATED.
	Oct 27 2000	Reply brief of petitioner Paul L. Glover filed.
	Nov 13 2000	Record filed.
	Nov 17 2000	Record filed.
	Nov 27 2000	ARGUED.

No. 99-8576

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

PAUL L. GLOVER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ORIGINAL

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

One year after his direct appeal had concluded, Mr. Glover discovered that his 84-month prison sentence was based on an incorrect calculation under the U.S. Sentencing Guidelines. While his original case was pending, the Seventh Circuit had issued a decision in another case interpreting a Guidelines issue in favor of defendants. Mr. Glover filed the instant action pursuant to 28 U.S.C. § 2255 to correct his sentence, on the ground that his attorney had provided ineffective assistance in failing to raise this binding Seventh Circuit decision.

The court of appeals affirmed the dismissal of Mr. Glover's Section 2255 action. In light of the dispositive appellate ruling that his counsel never raised, the court of appeals assumed that Glover's attorney performed inadequately. It also assumed that the deficient performance led to an offense level under the Sentencing Guidelines which was two levels higher than it should have been, and that this error caused Mr. Glover to receive a sentence that was 6 to 21 months higher than he should have received. Nevertheless, the Seventh Circuit held that such an increased sentence due to counsel's deficient performance "is not sufficiently significant to be cognizable on collateral attack." (App. 2). The questions on which review is sought are:

1. Whether the court of appeals erred in holding that an additional 6 to 21 months in prison due to counsel's error relating to the sentencing guidelines fails to satisfy the "prejudice" prong of *Strickland v. Washington*, 466 U.S. 668 (1984).

2. Whether the court of appeals erred in holding that a 2-level error in the offense level under the sentencing guidelines was *per se* insufficient to satisfy the "prejudice" prong of *Strickland v. Washington*, 466 U.S. 668 (1984), even where this 2-level error resulted in the petitioner being sentenced to an additional 6 to 21 months in prison.

PARTIES

All of the parties to the proceedings below are listed in the caption of the case, *supra*. *See* Sup. Ct. R. 14.1(b).

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 2

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS 2

SUMMARY OF THE ARGUMENT 2

STATEMENT OF THE CASE 5

1. Conviction and Sentence 5

2. Section 2255 Motion 5

3. District Court's Decision 6

4. Court of Appeals' Decision 7

REASONS FOR GRANTING THE PETITION 8

A. The Seventh Circuit's "Significant Prejudice" Requirement Is Contrary to Supreme Court Precedent 9

B. The Seventh Circuit's Interpretation of "Prejudice" Conflicts With Other Circuits and District Courts 14

C. The Seventh Circuit's "Significant Prejudice" Requirement Leads to Arbitrary And Inconsistent Results 20

D. This Case Presents An Issue of Recurring Importance 22

CONCLUSION 24

TABLE OF AUTHORITIES

Cases **Page**

Allen v. United States,
175 F.3d 560 (7th Cir. 1999) 8, 21, 23

Argersinger v. Hamlin,
407 U.S. 25 (1972) 3, 12

Arredondo v. United States,
178 F.3d 778 (6th Cir. 1999) 19

Baldasar v. Illinois,
446 U.S. 222 (1980) 13

Baldwin v. New York,
399 U.S. 66(1970) 12, 13

Burgos v. United States,
968 F.Supp. 380 (N.D. Ill. 1997) 8, 23

Davis v. United States,
1998 WL 142369 (N.D. Ill. March 19, 1998) 8, 23

Day v. United States,
191 F.3d 455, 1999 WL 528145 (7th Cir. July 20, 1999) 23

Duncan v. Louisiana,
391 U.S. 145 (1968) 13

Durrive v. United States,
4 F.3d 548 (7th Cir. 1993) ..... *passim*

Fout v. United States,
165 F.3d 32, 1998 WL 636780 (7th Cir. Aug. 27, 1998) 23

Gil v. United States,
4 F. Supp. 2d 760 (N.D. Ill. 1998) 14, 23

Gonzalez v. United States,
967 F. Supp. 326 (N.D. Ill. 1997) 14, 23

Harden v. United States,
191 F.3d 456, 1999 WL 547979 (7th Cir. July 20, 1999) 23

Jackson v. Leonardo,
162 F.3d 81 (2d Cir. 1998).....16, 17

Lockhart v. Fretwell,
506 U.S. 364 (1993).....*passim*

Martin v. United States,
109 F.3d 1177 (7th Cir. 1996).....*passim*

Robinson v. United States,
196 F.3d 748 (7th Cir. 1999).....23

Scott v. Illinois,
440 U.S. 367 (1979).....13

Smith v. United States,
871 F. Supp. 251 (E.D. Va. 1994).....19

Spriggs v. Collins,
993 F.2d 85 (5th Cir. 1993).....4, 17, 18, 19

Strickland v. Washington,
466 U.S. 668 (1984).....*passim*

Unger v. United States,
8 F. Supp. 1151 (E.D. Wis. 1998).....23

United States v. Allen,
175 F.3d 560 (7th Cir. 1999).....8

United States v. Day,
969 F.2d 39 (3d Cir. 1992).....22

United States v. Evans,
1995 WL 423693 (N.D. Ill. July 17, 1995).....23

United States v. Ford,
918 F.2d 1343 (8th Cir. 1990).....15

United States v. Glover,
101 F.3d 1183 (7th Cir. 1996).....5, 6

United States v. Granados,
168 F.3d 343 (8th Cir. 1999).....15

United States v. Harfst,
168 F.3d 398 (10th Cir. 1999).....19

United States v. Headley,
923 F.2d 1079 (3d Cir. 1991).....16

United States v. Hubbard,
1997 WL 639232 (N.D. Ill. Oct. 6, 1997).....14, 22, 23

United States v. Kissick,
69 F.3d 1048 (10th Cir. 1995).....19

United States v. Murray,
176 F.3d 476, 1999 WL 187192, (4th Cir. 1999).....18

United States v. Palomba,
31 F.3d 1456 (9th Cir. 1994).....17

United States v. Paz,
1997 WL 158338 (N.D. Ill. March 31, 1997).....21, 23

United States v. Segler,
37 F.3d 1131 (5th Cir. 1994).....18

United States v. Soto,
132 F.3d 56 (D.C. Cir. 1997).....16, 22

United States v. Tai,
972 F. Supp. 434 (N.D. Ill. 1997).....22, 23

United States v. Thompson,
27 F.3d 671 (D.C. Cir.).....16

United States v. Wheeler,
81 F.3d 171, 1996 WL 155139 (9th Cir. April 2, 1996).....17

United States v. Wilson,
98 F.3d 281 (7th Cir. 1996).....6

Statutes, Regulations and Other Materials

18 U.S.C. § 1954.....5

18 U.S.C. § 1956(a)(1)(B)(I).....5

18 U.S.C. § 1962(d).....5

26 U.S.C. § 7206.....5

28 U.S.C. § 1254(a) 2
28 U.S.C. § 2255 ..... *passim*
Sup. Ct. R. 14.1(b) ii
U.S.S.G. § 301.2 ..... 5, 7

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

No.

PAUL L. GLOVER,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

Paul L. Glover respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals was reported at 182 F.3d 921 (7th Cir. 1999) (Table) and is reproduced in the Appendix at App. 1. The opinion of the United States District Court for the Northern District of Illinois was not reported and is reproduced in the Appendix at App. 3.

JURISDICTION

The judgment of the court of appeals was entered on July 15, 1999. A timely petition for rehearing was denied on October 7, 1999. (App. 8). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(a).

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The relevant constitutional provisions are the Sixth and Fourteenth Amendments to the United States Constitution.

SUMMARY OF THE ARGUMENT

This case raises an issue of recurring importance — whether defense counsel's error relating to the U.S. Sentencing Guidelines which causes the defendant to be sentenced to additional months of incarceration (in this case, between 6 and 21 months of additional imprisonment) constitutes ineffective assistance of counsel under the Sixth Amendment. Here, due to counsel's ineffective performance, the district court made a clear error in calculating the offense level. Under the correct offense level, petitioner's sentence of imprisonment should have been between 6 to 21 months lower than the 84-month sentence he actually received. Nevertheless, while conceding counsel's deficient performance and the incorrect sentencing calculations, the court of appeals denied petitioner's motion under 28 U.S.C. § 2255 to correct his sentence. Applying the governing case law in the circuit, the Seventh Circuit held that an additional 6 to 21 months in prison was not "sufficiently significant" to satisfy the prejudice prong of the ineffective assistance of counsel standard. According to the Seventh Circuit, to be "significant prejudice," a counsel's error must lead to an incorrect sentence of more than two offense levels under the Sentencing Guidelines.

The Seventh Circuit's rule represents a marked and unwarranted departure from this Court's established precedents relating to constitutionally ineffective assistance of counsel. In adding a a new "significance" threshhold, the Seventh Circuit misconstrues the prejudice requirement as set out in *Strickland v. Washington*, 466 U.S. 668 (1984), and interpreted in *Lockhart v. Fretwell*, 506 U.S. 364 (1993). Nowhere in *Strickland* does the Court even suggest that additional months in prison due to counsel's deficient performance would not constitute prejudice. Contrary to the Seventh Circuit's reasoning, the Supreme Court's decision in *Lockhart* also does not support the conclusion that defendant must show "significant prejudice." *Lockhart* addressed the narrow circumstances where the habeas petitioner's ineffectivenesss claim was based on the attorney's failure to invoke at sentencing a court of appeals decision that was later overruled. The *Lockhart* Court refused to allow the habeas petitioner to obtain "a windfall;" that is a far cry from the instant case where Mr. Glover simply asks for the correct application of the Sentencing Guidelines. Moreover, the Seventh Circuit's decision is contrary to this Court's Sixth Amendment jurisprudence which has recognized that any term of imprisonment, even one day, requires the effective assistance of counsel. *See Argersinger v. Hamlin*, 407 U.S. 25 (1972) (rejecting argument that right to counsel exists only for felony offenses and holding that no person may be imprisoned for *any* period without presence of counsel at trial).

Not surprisingly, the decision below also conflicts with other courts of appeals and district courts which have declined to adopt the Seventh Circuit's "significant prejudice" requirement. The D.C., Third, and Eighth Circuits have not adopted the Seventh Circuit's "significant prejudice" rule and have granted Section 2255 motions where the change due to counsel's error is two offense levels or less. Furthermore, and even more striking, the Second

and Ninth Circuits have granted Section 2255 motions where there is no effect on the actual prison term of the petitioner. Even those circuit courts which favor a "significant prejudice" test – the Fourth, Fifth and Tenth Circuits -- have not adopted the Seventh Circuit's rule that a two-offense level change due to counsel's deficient performance is *per se* insufficient to constitute "prejudice" under *Strickland*. The Fifth Circuit has expressly recognized "an exception" for the very type of situation raised by Mr. Glover here -- "when a deficiency by counsel resulted in a specific, demonstrable enhancement in sentencing."[1] *Spriggs v. Collins*, 993 F.2d 85, n.4 (5th Cir. 1993).

The Seventh Circuit's "significant prejudice" rule also has led to inconsistent results in the lower courts. These courts have not been provided guidelines or standards for determining whether an increased sentence due to counsel's error is "significant." Instead, the lower courts are left to their own devices in attempting to evaluate if it is the number of months, number of offense levels, percentage of total sentence, or some other variable which is critical to showing sufficient prejudice. The seemingly arbitrary nature of the lower court decisions relating to what constitutes "significant prejudice" damages the public's confidence in the court system and precludes the consistency in sentencing which was the goal of the Sentencing Guidelines.

This Court's review is necessary to establish uniformity on the issue of whether, and in what circumstances, additional months in prison due to counsel's deficient performance constitutes constitutionally ineffective assistance. There already have been numerous cases

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1 The Sixth Circuit has noted the split within the courts of appeals and expressed doubts about the Seventh Circuit's position. Thus far, however, the Sixth Circuit has not been required to rule on the issue.

across the country which involve the precise situation and issue raised by Mr. Glover's case. Given the frequently recurring nature of the problem of mistakes by counsel relating to Sentencing Guidelines calculations, it is especially important that this Court grant the writ in this case and end the confusion among the lower courts.

STATEMENT OF THE CASE

1. Conviction and Sentence

Following a jury trial, defendant Paul Glover was found guilty of one count of a conspiracy in violation of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962(d); eleven counts of soliciting and receiving kickbacks in violation of 18 U.S.C. § 1954; two counts of money laundering in violation of 18 U.S.C. § 1956(a)(1)(B)(I); and four counts of tax evasion in violation of 26 U.S.C. § 7206. At the time of sentencing, it was determined that Mr. Glover's total offense level was 28 and his criminal history category was level I, resulting in a guideline range of 78 to 97 months. He was sentenced to 84 months' incarceration. Mr. Glover's conviction and sentence were affirmed on direct appeal, where he was represented by the same counsel who represented him at trial. *See United States v. Glover*, 101 F.3d 1183 (7th Cir. 1996).

2. Section 2255 Action

Less than one year after the decision on appeal became final, Glover filed his present action in the U.S. District Court for the Northern District of Illinois pursuant to 28 U.S.C. § 2255 to vacate, set aside or correct his sentence. Mr. Glover contended that his sentencing range was incorrectly calculated because his money laundering offenses were not grouped with his conspiracy and kickback offenses. *See* U.S.S.G. § 301.2. He further contended that his counsel

was ineffective for failing to urge this issue at the time of sentencing and for failing to raise the issue at all on direct appeal. *In United States v. Wilson*, 98 F.3d 281, 282-84 (7th Cir. 1996), the Seventh Circuit had held that money laundering offenses and mail fraud offenses should be grouped together. As the government conceded before the district court, *Wilson* would be controlling as to the grouping of Mr. Glover's conspiracy, kickback, and money laundering offenses. The *Wilson* case was argued on April 1, 1996 and issued on October 17, 1996, months before the decision on Mr. Glover's appeal was issued. *Glover*, 101 F.3d at 1183.

In his Section 2255 motion, Mr. Glover claimed that his counsel's ineffective assistance during the sentencing had caused Glover to receive an incorrect sentence. Mr. Glover was sentenced to 84 months incarceration based on the court's finding of an offense level of 28 and a guideline range of 78 to 97 months. Had the money laundering been grouped with the conspiracy and kickback offenses, the total offense level would have been 26 and the guideline range would have been 63 to 78 months. Due to his counsel's deficient performance, Mr. Glover's sentence was incorrectly extended by at least 6 months and possibly up to 21 months.

3. District Court's Decision

The federal district court dismissed petitioner's Section 2255 motion. The district court found it unnecessary to consider the issue of whether Mr. Glover's counsel's performance was deficient. (App. 5). The court noted that Seventh Circuit precedent required that "[w]hen, as here, the constitutional basis for relief on such a claim is ineffective assistance of counsel, the potential change in sentence must be a 'significant' amount in order to satisfy the prejudice prong of an ineffective assistance of counsel claim." (App. 5). Applying the Seventh Circuit's rulings in *Durrive v. United States*, 4 F.3d 548 (7th Cir. 1993), and *Martin v. United States*, 109 F.3d 1177, 1178 (7th Cir. 1996), *cert. denied*, 522 U.S. 931 (1997), the district court concluded

that the Seventh Circuit stated a *per se* rule that a change of two offense levels would not be sufficient to constitute "significant prejudice." (App. 5-6). Accordingly, the district court held that "Because the error claimed in the present case [between 6 and 21 months of additional imprisonment] did not have a significant effect on Glover's sentence, he does not state any basis for granting § 2255 relief." (App. 6).

4. Court of Appeals' Decision

The Seventh Circuit affirmed on appeal, relying on the same basic rationale as the district court. The court of appeals assumed that Mr. Glover's attorneys had performed deficiently in failing to argue the correct interpretation of U.S.S.G. § 301.2 relating to the grouping of his money laundering offenses with his conspiracy and kickback offenses. (App. 1). The Seventh Circuit, however, held that under the existing precedent in that court, Mr. Glover could not demonstrate sufficient prejudice to satisfy the second prong of *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The Seventh Circuit stated, in pertinent part:

> This court has held that only a significant increase in the sentencing rises to the level of the type of prejudice that will support an ineffective assistance of counsel claim on collateral attack.
>
> At sentencing, the district court determined that Glover's adjusted offense level under the Sentencing Guidelines was 28 and his criminal history category was I, resulting in a sentencing range of 78 to 97 months in prison. The court selected a mid-point in the range, sentencing Glover to 84 months in prison. Glover alleges that, but for the errors of his counsel, his adjusted offense level would have been 26, resulting in a range of 63-78 months imprisonment. Thus, he argues, his sentence would have been 6 to 21 months lower than the 84-month sentence he received. Unfortunately for Glover, under *Martin* and *Durrive*, this potential decrease is not sufficiently significant to be cognizable on collateral attack.

(App. 1-2) (citations omitted).

REASONS FOR GRANTING THE PETITION

In *Durrive v. United States*, 4 F.3d 548 (7th Cir. 1993), the Seventh Circuit first announced that errors in sentencing calculations caused by counsel's deficient performance must be "significant" to constitute constitutionally ineffective assistance of counsel. According to the *Durrive* court, only "Grave errors by judge and counsel" -- "[f]or instance, an error that produces a large effect on the sentence" – could be deemed prejudicial for *Strickland* purposes. *Id* at 551. Subsequent panels within the Seventh Circuit, including in the instant case, have followed *Durrive*. *See, e.g., Martin*, 109 F.3d at 1177-78; *Allen v. United States,*, 175 F.3d 560, 563 (7th Cir. 1999).

This Court should grant the writ in Mr. Glover's case to review and reverse this Seventh Circuit rule requiring "significant prejudice" of more than two offense levels under the Sentencing Guidelines. The Seventh Circuit's rule has no support in *Strickland* or subsequent Supreme Court jurisprudence. The "significant prejudice" rule also has not been widely followed in the circuit courts or trial courts outside of the Seventh Circuit. Even within the Seventh Circuit, three judges, including one of its original proponents, have strongly attacked the rule that additional months in prison does not constitute "significant" prejudice, *Martin v. United States*, 109 F.3d 1177, 1178 (7th Cir. 1997) (Judge Rovner, dissenting on denial of *en banc* review), and district courts have considered the reasoning underlying this rule to be "questionable," *Burgos v. United States,* 968 F.Supp. 380, 384 (N.D. Ill. 1997), and "the source of considerable debate." *Davis v. United States*, 1998 WL 142369 *3 n.5 (N.D. Ill. March 19, 1998) (citing numerous cases).

A. The Seventh Circuit's "Significant Prejudice" Requirement Is Contrary to Supreme Court Precedent

The Seventh Circuit has adopted a rule that an increased prison term due to a sentencing error caused by counsel's deficient performance does not constitute prejudice for the purpose of the *Strickland* analysis unless the increase is significant. Unfortunately, the Seventh Circuit's rule is contrary to Supreme Court precedent.

The Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 690 (1984), established a two-part test for reviewing claims of ineffective assistance of counsel. First, a defendant must demonstrate that his counsel's performance fell below an objective standards of reasonableness. Second, a defendant must demonstrate that he suffered prejudice due to his counsel's deficient performance. This second prong requires that the defendant "show that there is a reasonable probability . . . that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

Nowhere in *Strickland* does the Court state that the defendant must show "*significant* prejudice." Nor is there any indication that the defendant must show a large increase in his prison sentence. Instead, *Strickland* makes clear that the test is whether counsel's errors have adversely affected the proceeding's outcome: "taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors." *Id.* at 696. Plainly, as the court of appeals itself assumed here, Mr. Glover can demonstrate that the sentence in his case "would reasonably likely have been different" had his counsel asserted the groupings issue and the dispositive Seventh Circuit case in his favor.

In support of grafting a "*significant* prejudice " requireme nto *Strickland*, the Seventh Circuit in *Durrive* relied on a single quote from *Lockhart v. Fret* 06 U.S. 364 (1993):

> [A]n analysis focusing solely on mere outcome determination without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective. To set aside a conviction or sentence solely because the outcome would have been different but for counsel's error may grant the defendant a windfall to which the law does not entitle him.

Durrive, 4 F.3d at 551 (quoting *Lockhart*, 506 U.S. at 369-70).[2] The Seventh Circuit, however, failed to explain why this quotation from *Lockhart* should mandate a requirement that counsel's error cause a sizeable increase in defendant's prison sentence. There can be no doubt that the "result of the proceeding was fundamentally unfair or unreliable" in Mr. Glover's case—in fact, Glover received a sentence which was 6 to 21 months more than he should have received under the applicable law and regulations. There also can be no claim that Glover received "a windfall to which the law does not entitle him"—in fact, his counsel's deficient performance caused Glover to receive an injury which he should not have received, *i.e.*, a sentence longer than the Sentencing Guidelines properly allowed.

Lockhart involved a highly unusual set of facts. The question in *Lockhart* was whether a habeas petitioner could prevail on an ineffectiveness claim based on the attorney's failure to invoke at sentencing a decision of the Eighth Circuit that was later overruled. Faced with this

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2 As Judge Rovner noted in criticizing the reasoning behind the Seventh Circuit's rule,

> Although *Durrive* held out *Lockhart* as the foundation for its holding, I believe the court overlooked not only the context of the Supreme Court's [*Lockhart*] decision but limitations in the very language of its opinion.

Martin, 109 F.3d at 1180 (Judge Rovner, dissenting).

issue, the court of appeals in *Lockhart* had ruled in favor of Fretwell on the ground that had his counsel made a timely objection, the trial court would have been compelled to follow then-controlling Eighth Circuit law and modify his sentence to life imprisonment. The Supreme Court disagreed with this single-minded focus on "mere outcome determination, " believing that such an approach would provide an unwarranted "windfall" to Fretwell since he was attempting to rely on counsel's failure to raise case law which subsequently had been discredited and rejected. According to the *Lockhart* court, counsel's error had, at most, "deprived [Fretwell] of the chance to have the state court make an error in his favor." *Id.* at 371.[3]

Fretwell's situation was in stark contrast to the instant case where Mr. Glover has been harmed by his counsel's failure to have the court apply the proper law relating to his sentence. As Judge Rovner noted in her dissent:

> Absolutely nothing in *Lockhart* addresses this situation. Nowhere does *Lockhart* suggest that a sentencing may still be described as fair and reliable when it is clear that the sentencing court has sentenced the petitioner to an excessive term, and only his attorney's ineffectiveness has prevented correction of the error either in the district court or on direct appeal. *Nothing in Lockhart remotely suggests that only when an attorney's ineffectiveness results in a 'significant' harsher sentence may the prejudice be recognized on collateral review.*

Martin, 109 F.3d at 1181-82 (emphasis added). Thus, the single Supreme Court case relied on by the Seventh Circuit does not support its attempt to add a "significance" requirement to the prejudice prong of the *Strickland* analysis.[4]

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3 As the *Lockhart* Court noted, the defendant "has no entitlement to the luck of a lawless decisionmaker." 506 U.S. at 370 (quoting *Strickland*, 466 U.S. at 695).

4 The decision in *Lockhart* is a narrow one. As Justice O'Connor explained in her concurrence:

Footnote continued

The Seventh Circuit's rule also cannot be reconciled with fundamental Sixth Amendment jurisprudence. The Supreme Court has previously rejected the argument that a few months imprisonment is 'insignificant' for the purposes of a defendant's constitutional right to effective counsel. This was the precise issue in *Argersinger v. Hamlin*, 407 U.S. 25 (1972). There, the petitioner had been unrepresented by counsel in connection with a misdemeanor offense which had a maximum punishment of six months imprisonment. He had been convicted and sentenced to serve three months in prison. The *Argersinger* Court unanimously reversed the conviction, holding that petitioner was entitled to counsel in any case resulting in imprisonment. According to the Court, "no person may be imprisoned for any offense, whether classified as petty, misdemeanor or felony, unless he was represented by counsel at his trial." *Id.* at 37. The Supreme Court in *Argersinger* saw no reason to differentiate between three months or six months or twelve months in prison, but considered any term of imprisonment to be significant enough to implicate the Sixth Amendment's right to counsel. As the Court noted, "the prospect of imprisonment for however short a time will seldom be viewed by the accused as a 'trivial' or 'petty' matter and may well result in quite serious reprecussions. . ." *Id.* (quoting *Baldwin v. New York*, 399 U.S. 66, 73 (1970)).

Footnote continued from previous page

> Specifically, today we hold that the court making the prejudice determination may not consider the effect of an objection it knows to be wholly meritless under current governing law, even if the objection might have been considered meritorious at the time of its omission. That narrow holding, of course, precisely disposes of this case as it appeared before the Eighth Circuit.

506 U.S. at 374.

Footnote continued

In subsequent decisions, this Court has reaffirmed its *Argersinger* decision and emphasized the special nature of imprisonment. In finding no right to counsel where the defendant was ultimately fined and not imprisoned, Chief Justice Rehnquist noted:

> the [*Argersinger]* Court's conclusion [was] that incarceration was so severe a sanction that it should not be imposed as a result of a criminal trial unless an indigent defendant had been offered appointed counsel to assist in his defense, regardless of the cost to the States implicit in such a rule. The Court in its opinion repeatedly referred to trials "where an accused is deprived of his liberty" id, at 32, and to "a case that actually leads to imprisonment even for a brief period," id. at 33. The Chief Justice in his opinion concurred in the result also observed that "any deprivation of liberty is a serious matter." Id. at 41.

Scott v. Illinois, 440 U.S. 367, 372-73 (1979). *See also Baldasar v. Illinois*, 446 U.S. 222 (1980) (holding that uncounseled misdemeanor conviction may not be used under an enhanced penalty statue to convert a subsequent misdemeanor into a felony with a prison term).

The Seventh Circuit's rule -- that 6 to 21 additional months imprisonment is not "significant" -- also clashes with this Court's teachings under the right to trial by jury. The right to a jury trial is guaranteed by the Sixth Amendment for any trial where the potential punishment is imprisonment of six months or more. *See Baldwin v. New York*, 399 U.S. at 66; *Duncan v. Louisiana*, 391 U.S. 145 (1968). As the controlling opinion of Justice White stated in *Baldwin*, "no offense can be deemed 'petty' for purposes of the right to trial by jury where imprisonment for more than six months is authorized." 399 U.S. at 69.

Footnote continued from previous page

The Seventh Circuit's rule requiring a showing of "*significant* prejudice" has no support in this Court's decisions in *Strickland* or *Lockhart*. Furthermore, it conflicts with the Supreme Court's prior holdings that any term of imprisonment implicates the right to the effective assistance of counsel. The Seventh Circuit's decision below also is flatly inconsistent with the Supreme Court's conclusion that even the six months in prison is sufficient to warrant the full guarantees of the right to trial by jury. Accordingly, this Court should grant the writ and reverse the Seventh Circuit's mistaken interpretation of the Sixth Amendment of the U.S. Constitution.

B. The Seventh Circuit's Interpretation of "Prejudice" Conflicts With Other Circuits and District Courts

The Seventh Circuit has ruled that prejudice under *Strickland* requires a "significant" increase in one's prison sentence due to counsel's ineffective assistance. The Seventh Circuit has further held, as the instant case demonstrates, that such "significant prejudice" requires, at a minimum, an increase in a defendant's sentence of more than two offense levels under the sentencing guidelines. (App. 1-2).[5] The Seventh Circuit's interpretation of prejudice – that it must be "significant" and, at a minimum, exceed two offense levels under the sentencing guidelines – has not been followed by other courts of appeal or district courts outside the circuit. Indeed, there is a wide divergence of view among the lower courts on this issue of what constitutes prejudice under *Strickland* for sentencing errors.

The Eighth Circuit, for example, has twice taken a diametrically opposite position from the Seventh Circuit and granted Section 2255 motions nearly identical to Mr. Glover's action here. In *United States v. Granados*, 168 F.3d 343 (8th Cir. 1999), the petitioner challenged his conviction and 175-month sentence. He was sentenced as an offense level 32, which resulted in a range of 151-188 months. Petitioner's offense level should have been a level 30, or a range of 121-151 months. The court noted that Granados has been sentenced to additional months in prison solely "because his attorney was not familiar with the Guidelines." *Id.* at 346. In these circumstances, the Eighth Circuit did not consider there to be any question that Granados suffered prejudice and granted Granados' motion: "There can be little doubt that the petitioner's substantial rights are affected if his prison sentence is longer than it should have been." *Id.*[6] Similarly, in *United States v. Ford*, 918 F.2d 1343, 1350 (8th Cir. 1990), the Eighth Circuit found a two offense level error sufficient to satisfy *Strickland*. As the *Ford* court noted, "Had Ford's trial counsel objected to the base offense level of 34, it is possible the district court would have modified the level to reflect Ford's acceptance of responsibility. Ford's original sentence,

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5 *See Durrive*, 4 F.3d at 551 ("Adjusting the offense level by two or three steps is exactly the routine decision that is supposed to be handled at sentencing and on direct appeal. . . . [N]o one would have dreamed that choices influencing the term of imprisonment within such a narrow range could be relitigated on collateral attack."); *Martin*, 109 F.3d at 1178 ("the sort of increase produced by a few levels' difference in sentencing calculations cannot be raised indirectly on collateral attack by complaining about counsel's work"); *Gil v. United States*, 4 F. Supp. 2d 760, 769 (N.D. Ill. 1998) ("This two-point difference does not constitute a significant difference in Gil's sentence," citing *Martin*); *United States v. Hubbard*, 1997 WL 639232, *4 (N.D. Ill. Oct. 6, 1997) ("The Seventh Circuit [in *Martin*] appeared to state a per se rule that a change of two offense levels would not satisfy the 'significant' change requirement."); *Gonzalez v. United States*, 967 F. Supp. 326, 332 (N.D. Ill. 1997) ("Gonzalez – just like *Durrive* and *Martin* –

Footnote continued

Footnote continued from previous page

complains about a two-level difference, i.e., a 'few levels' difference.' Such an argument is barred from review by way of a § 2255 motion pursuant to the holdings of *Durrive* and *Martin*.").

6 In fact, the *Granados* court raised *sua sponte* the whole issue of counsel's ineffective assistance concerning the Sentencing Guidelines, despite the fact that it had never been raised by petitioner in his pleadings.

300 months, is 38 months longer than the maximum sentence resulting from a base offense level of 32. Counsel's error had an effect on Ford's sentence, and therefore we reverse Ford's sentence . . ." *Id.*

The D.C. Circuit also has not adopted a "significant prejudice" requirement. In *United States v. Thompson*, 27 F.3d 671 (D.C. Cir.), *cert. denied*, 513 U.S. 1050 (1994), the D.C. Circuit found the prejudice prong of *Strickland* was satisfied by a one offense level change. Despite the United States' argument that Thompson had not demonstrated prejudice, the D.C. Circuit disagreed and remanded for a determination as to whether, but for counsel's deficient performance, Thompson would have been sentenced as if his offense level was 34 instead of 35. In *United States v. Soto*, 132 F.3d 56, 59 (D.C. Cir. 1997), the D.C. Circuit also applied the *Strickland* test without any "significant prejudice" threshold. The Court found in favor of Soto's ineffective assistance claim, noting that Soto's counsel error would have reduced Soto's sentence by at least two offense levels (17 months). *Id.*

The Third Circuit also has analyzed the same fact pattern as *Soto*, namely, petitioner's counsel failing to argue for a downward departure under the Guidelines for being a minimal participant in the conspiracy. *United States v. Headley*, 923 F.2d 1079 (3d Cir. 1991). The Third Circuit also did not impose any "significant prejudice" requirement, nor any requirement that the incorrect sentence involve more than two offense levels. *Id.* at 1081-82, 1084.

The Second and Ninth Circuits also have declined to graft a "significance" requirement onto the *Strickland* prejudice prong and, instead, have found prejudice where the counsel's deficient performance causes *no* additional prison time. These circuits addressed ineffective assistance of counsel claims in connection with convictions on counts which were to run concurrently with other, unreviewed convictions. *See Jackson v. Leonardo*, 162 F.3d 81 (2d Cir. 1998); *United States v. Palomba*, 31 F.3d 1456 (9th Cir. 1994). Even though there was no actual effect on the petitioner's sentence, these courts found that the possibility of enhanced sentence should petitioner be later arrested and sentenced under a repeat offender statutes constituted sufficient prejudice under *Strickland*. *See Jackson*, 162 F.3d at 86; *Palomba*, 31 F.3d at 1465.[7] The D.C. and Ninth Circuits did not debate whether the possibility of later injury from a conviction on an additional count was "significant." Nor was there any discussion about whether the possible later injury equaled a two offense level increase in prison time. These courts believed that the possibility of an impact on defendant's sentence was sufficient to satisfy *Strickland*: "It is settled that an error that may increase a defendant's sentence is prejudicial." *Palomba*, 31 F.3d at 1465 (citations omitted). While recognizing that "the degree of prejudice may not seem great," *Jackson*, 162 F.3d at 86, these circuits held that the mere possibility of a later enhanced sentence "satisfied the unfair prejudice prong under *Strickland* and [*Lockhart v.*] *Fretwell's* test for ineffective assistance." *Palomba*, 31 F.3d at 1466.[8]

Moreover, even the circuits which have required "significant prejudice" have indicated that they would not adopt the two-offense level *per se* rule that the Seventh Circuit applied here. Thus, the Seventh Circuit in *Durrive* pointed to the decision in *Spriggs v. Collins*, 993 F.2d 85 (5th Cir. 1993), in support of its rule. Spriggs had complained of counsel's failure to object to

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7 Other possible sources of prejudice include the stigma of an improper conviction and its possible use to impeach the defendant's credibility in future proceedings. 31 F.3d at 1465.

8 In fact, the Ninth Circuit has expressly declined to adopt the "significant prejudice" rule of the Seventh Circuit: "To begin with, the Ninth Circuit has not adopted *Spriggs* [and *Durrive]* and continues to use the regular *Strickland* test." *United States v. Wheeler*, 81 F.3d 171, 1996 WL 155139 (9th Cir. April 2, 1996).

certain facts in the presentence report which might have affected the judge's exercise of his discretion in sentencing. Given the latitude of the judge's discretion, the *Spriggs* court required a showing that the attorney's deficient performance had led to a significant increase in the defendant's prison term. Yet, in *Spriggs*, the Fifth Circuit was careful to state that the "significant prejudice" concept should not be the rote, automatic rule of the Seventh Circuit here. In language which would be controlling in Mr. Glover's case, the *Spriggs* court qualified its "significant prejudice" requirement:

> "Significance" is a relative term here .... We note that one foreseeable exception to this requirement would be when a deficiency by counsel resulted in a specific, demonstrable enhancement in sentencing—such as an automatic increase for a 'career' offender or an enhancement for use of a handgun during a felony— which would have not occurred but for counsel's error.

Id. at n.4. The Fifth Circuit also has made clear that, rather than the Seventh Circuit's inflexible rule, the "significance" test in the Fifth Circuit involved the trial court's consideration of a host of factors:

> In deciding whether such prejudice occurred, a court should consider a number of factors: the actual amount of the sentence imposed on the defendant by the sentencing judge or jury; the minimum and maximum sentences possible under the relevant statute or sentencing guidelines, the relative placement of the sentence actually imposed within that range, and the various relevant mitigating and aggravating factors that were properly considered by the sentences.

Id. at 88-9. *See also United States v. Segler*, 37 F.3d 1131, 1136 (5th Cir. 1994) (same).

The Fourth and Tenth Circuits also have accepted the "significant prejudice" requirement, but these two circuits do not appear to have adopted the Seventh Circuit's rule that a two-offense level change is *per se* insufficient to demonstrate prejudice. In fact, courts in these circuits have found two-offense level changes to be satisfactory. *See, e.g., United States v. Murray*, 176 F.3d

476, 1999 WL 187192,*5 (4th Cir. 1999) (*Strickland* prejudice found where counsel's deficient performance may have caused petitioner to be sentenced as level 39, rather than level 37); *United States v. Kissick*, 69 F.3d 1048 (10th Cir. 1995) (*Strickland* prejudice found where counsel's deficient performance may have caused petitioner to be assigned a criminal history category VI, rather than a IV) (noting that, "Importantly, the *Spriggs* [decision] added that 'one foreseeable exception to this requirement would be when a deficiency by counsel resulted in a specific, demonstrable enhancement in sentencing – such as an automatic increase for a 'career' offender or an enhancement for use of a handgun during a felony – which would have not occurred but for counsel's error.'" *Id.* at 1055); *United States v. Harfst*, 168 F.3d 398 (10th Cir. 1999) (*Strickland* prejudice demonstrated where counsel's deficient performance may have caused petitioner to be sentenced at a two or four offense levels too high.); *Smith v. United States*, 871 F. Supp. 251, 256 (E.D. Va. 1994) (*Strickland* prejudice found where counsel's deficient performance may have caused petitioner to be sentenced as an offense level 40, rather than level 38).

Finally, the Sixth Circuit has recognized that the Fifth, Seventh and Tenth Circuits "have modified the second prong of the Strickland test" by requiring "that but for trial counsel's errors the defendants' non-capital sentence would have been significantly less harsh." *Arredondo v. United States*, 178 F.3d 778, 784 (6th Cir. 1999). The *Arredondo* court also noted that the Fifth Circuit provided for an "exception" where counsel's deficient performance resulted in a "specific, demonstrable enhancement in sentencing," but that it was "unclear" whether the Seventh or Tenth Circuit recognized this exception. *Id.* Because the case before it satisfied even a heightened standard of prejudice, the Sixth Circuit concluded that it "need not resolve today the degree of prejudice that is required for *Strickland* to apply to claims of ineffective assistance

during noncapital sentencing proceedings." *Id.* Nevertheless, the Sixth Circuit expressed serious misgivings about the Seventh Circuit's reasoning in *Durrive*, noting

> we question whether this issue is best addressed by modifying the prejudice prong of *Strickland*. The degree of the attorney's error may better be evaluated directly, under *Strickland's* performance.

Id.

Here, Mr. Glover suffered from a "clear, demonstrable enhancement in sentencing" due to his counsel's deficient performance – he was sentenced at an offense level 28 rather than a level 26, resulting in an additional sentence of between 6 to 21 months. The Seventh Circuit has held that Mr. Glover cannot demonstrate prejudice as a matter of law. As demonstrated above, this decision directly conflicts with the holdings of numerous other circuit courts. The courts of appeals have expressed widely divergent views on this issue. Accordingly, this Court should grant certiorari in this case to resolve this conflict and create uniformity in the federal court's handling of this important issue.

C. The Seventh Circuit's "Significant Prejudice" Requirement Leads to Arbitrary And Inconsistent Results

The Seventh Circuit refuses to find constitutionally ineffective assistance of counsel unless counsel's error relating to the sentencing guidelines causes a "significant" increase in the defendant's sentence. Other than to state that a change in "a few levels" is not sufficient prejudice, however, the Seventh Circuit has not explained how the lower courts are to determine what is a "significant" increase in a defendant's sentence. The inevitable result has been arbitrary and inconsistent lower court decisions.

Mr. Glover's case is an example of the problems inherent in the Seventh Circuit's broad rule. As an offense level 28, Glover's sentencing guideline range was 78 to 97 months and he

received an 84-month sentence. But for his counsel's deficient performance, Glover should have been sentenced as an offense level 26 with a guidelines range of 63 to 78 months. Assuming that he would have been sentenced to the low end of the correct sentencing range, Mr. Glover received an "extra" 21 months in prison due to his counsel's error. Is the Seventh Circuit saying that 21 months can never rise to the level of "significant prejudice"? The Seventh Circuit has characterized its "significant prejudice" requirement as "a rule of proportionality." *Martin*, 109 F.3d at 1178. Here, Mr. Glover's sentence was increased by up to 25 percent (21 months increase on an 84-month sentence). Is the Seventh Circuit's view that an increase in one's term of imprisonment of 25% can never rise to the level of "significant prejudice"? The Seventh Circuit seems committed to its *per se* rule that two or three offense levels can never satisfy the prejudice prong of *Strickland*. But in some cases, two or three offense levels can mean 89 to 112 months of additional time in prison. *See Martin*, 109 f.3d at 1183 (Judge Rovner, dissenting). Does the Seventh Circuit believe that eight or nine additional years in prison is not "significant"?[9]

Without any real guidance, judges are left to their own unfettered discretion. It is not surprising in these circumstances that the lower courts' application of the Seventh Circuit's "significant prejudice" rule has been inconsistent. *Compare, e.g., Allen v. United States*, 175 F.3d 560 (7th Cir. 1999) (42 additional months in prison; no prejudice); *United States v. Paz*, 1997 WL 158338 (N.D. Ill. March 31, 1997) (41 additional months in prison; no prejudice); *with*

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9 "If an increase of eight or nine years is not 'significant,' what is? Does the 'significance' depend on the overall length of the petitioner's term? In other words, would an increase of a year be 'insignificant' for someone serving a ten-year term, but 'significant' for someone serving a two-year term?" *Martin*, 109 F.3d at 1183 (Judge Rovner, dissenting).

United States v. Tai, 972 F. Supp. 434 (N.D. Ill. 1997) (15 to 42 additional months in prison; prejudice found) ("An increase of more than 15 months in the length of a prisoner's sentence seems "significant" to us. *Id.* at 437); *United States v. Hubbard*, 1997 WL 639232 (N.D. Ill. Oct. 6, 1997) (40 additional months in prison; prejudice found).

The arbitrary nature of the Seventh Circuit's rule corrodes public confidence in the federal judicial system and undermines the purpose of the Sentencing Guidelines. As Judge Rovner wrote:

> I cannot help but believe that in the adoption of this "significant" test, we have transformed ourselves into a kind of feudal duchy, with the power to grant or deny a reprieve to wrongfully sentenced prisoners according to our own whim. This is repugnant not only to our office as appellate judges but to the Guidelines themselves, which after all were adopted to achieve greater consistency in sentencing among similar situated defendants.

Martin, 109 F.3d at 1184. Accordingly, this Court should grant the writ and end these inconsistent and arbitrary results.

D. <u>This Case Presents An Issue of Recurring Importance</u>

"Familiarity with the structure and basic content of the [Sentencing] Guidelines . . . has become a necessity for counsel who seek to give effective representation." *United States v. Soto*, 132 F.3d 56, 59 (D.C. Cir. 1997) (quoting *United States v. Day*, 969 F.2d 39, 43 (3d Cir. 1992)).[10] It is true, unfortunately, that many attorneys have not successfully mastered the

10 "Whether lawyers get the Guidelines wrong by misinterpreting the implication of a particular provision or by failing altogether to raise a potentially helpful provision, . . . such drastic missteps clearly . . . amount to errors 'so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment.'" *United States v. Soto*, 132 F.3d at 59 (quoting *Strickland*, 466 U.S. at 687).

workings of the Guidelines. Accordingly, the problem of errors by counsel relating to the Sentencing Guidelines is a common and serious one.

The recurring nature of this issue is reflected in the numerous court of appeals decisions discussed above. *See supra* Section B. Yet, these cases do not fully reflect the scope of the problem. Many more trial court decisions address this issue of counsel's mistakes in interpreting the Sentencing Guidelines, including countless cases that go unreported. In the Seventh Circuit alone, for example, the court of appeals and district courts have addressed this issue on numerous occasions.[11]

In Mr. Glover's case, as in many cases in the Seventh Circuit and other jurisdictions, the courts have conceded that the defendant was sentenced to an incorrect prison term under the Sentencing Guidelines. The courts also have conceded that the defendant's counsel performed below the acceptable professional norm. These courts, however, are unwilling to correct these incorrect sentences. Instead, while acknowledging that "an extra year in custody is significant from the defendant's perspective," *Durrive*, 4 F.3d at 551, the courts have concluded that it is not

11 *See, e.g., Robinson v. United States*, 196 F.3d 748, 754 (7th Cir. 1999); *Day v. United States*, 191 F.3d 455, 1999 WL 528145 (7th Cir. July 20, 1999); *Harden v. United States*, 191 F.3d 456, 1999 WL 547979 (7th Cir. July 20, 1999); *Allen v. United States*, 175 F.3d 560 (7th Cir. 1999); *Martin v. United States*, 109 F.3d 1177 (7th Cir. 1996); *Durrive v. United States*, 4 F.3d 548 (7th Cir. 1993); *Unger v. United States*, 8 F. Supp. 1151 (E.D. Wis. 1998); *Gil v. United States*, 4 F. Supp. 2d 760 (N.D. Ill. 1998); *Fout v. United States*, 165 F.3d 32, 1998 WL 636780 (7th Cir. Aug. 27, 1998); *Davis v. United States*, 1998 WL 142369 (N.D. Ill. March 19, 1998); *United States v. Tai*, 972 F. Supp. 434 (N.D. Ill. 1997); *Burgos v. United States*, 968 F. Supp. 380 (N.D. Ill. 1997); *Gonzalez v. United States*, 967 F. Supp. 326 (N.D. Ill. 1997); *United States v. Paz*, 1997 WL 158338 (N.D. Ill. March 31, 1997); *United States v. Hubbard*, 1997 WL 639232 (N.D. Ill. Oct. 6, 1997); *United States v. Evans*, 1995 WL 423693 *8-9 (N.D. Ill. July 17, 1995).

worth their time and attention unless the additional time in prison achieves some unspecified higher level of "significant increase."

Having defendants serve prison sentences longer than the period called for by the applicable laws and regulations is an anathema to the rule of law. It is unjust, unfair and wrong. Yet, it is the current state of the law, not only for Mr. Glover, but in the Seventh Circuit and several other circuits. Absent intervention by this Court, more and more defendants will become victims of this wrongheaded and misguided "significant prejudice" rule. We therefore urge this Court to grant the writ of certiorari in this case and review this issue of recurring importance.

CONCLUSION

For all of the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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207475/DC01

2ND CASE of Level 1 printed in FULL format.

PAUL L. GLOVER, Petitioner-Appellant, v. UNITED STATES of AMERICA, Respondent-Appellee.

No. 98-4021

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

1999 U.S. App. LEXIS 16876

June 23, 1999 *, Submitted

* After an examination of the briefs and the record, we have concluded that oral argument is unnecessary. Thus, the appeal is submitted on the briefs and the record. See Fed. R. App. P. 34(a)(2).

July 15, 1999, Decided

NOTICE: [*1] RULES OF THE SEVENTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

SUBSEQUENT HISTORY: Reported in Table Case Format at: *1999 U.S. App. LEXIS 24471*.

PRIOR HISTORY: Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 97 C 8382. William T. Hart, Judge.

DISPOSITION: AFFIRMED.

COUNSEL: PAUL L. GLOVER, Petitioner - Appellant, Pro se, Marion, IL USA.

For UNITED STATES OF AMERICA, Respondent - Appellee: Stephen Andersson, OFFICE OF THE UNITED STATES, Chicago, IL USA.

JUDGES: Before Hon. DANIEL A. MANION, Circuit Judge, Hon. MICHAEL S. KANNE, Circuit Judge, Hon. DIANE P. WOOD, Circuit Judge.

OPINION: ORDER

Paul Glover was convicted of conspiracy, soliciting and receiving kickbacks, money laundering, and tax evasion, and was sentenced to 84 months in prison. He filed a motion under *28 U.S.C. § 2255* to vacate, set aside, or correct his sentence, on the ground that his lawyers were ineffective in failing to argue that the sentencing court should have grouped his money laundering offenses with his conspiracy and kickback offenses under U.S.S.G. § 3D1.2. The district court denied his motion, and we affirm.

In order [*2] to successfully claim ineffective assistance of counsel, Glover would need to show that his counsel performed below a constitutional threshold and that the deficient performance prejudiced him. See *Strickland v. Washington, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984)*. Even if we were to assume that Glover's attorneys performed inadequately, the second prong, prejudice, is missing here. Glover argues that his attorneys' failure to argue the correct interpretation of U.S.S.G. § 3D1.2 led to an adjusted offense level two levels higher than it should have been. This court has held that only a significant increase in the sentence rises to the level of the type of prejudice that will support an ineffective assistance of counsel claim on collateral attack. *Allen v. United States, 175 F.3d 560, 1999 WL 243623 (7th Cir. 1999); Martin v. United States, 109 F.3d 1177, 1178 (7th Cir. 1996); Durrive v. United States, 4 F.3d 548, 551 (7th Cir. 1993)*.

At sentencing, the district court determined that Glover's adjusted offense level under the Sentencing Guidelines was 28 and his criminal history category [*3] was I, resulting in a sentencing range of 78 to 97 months in prison. The court selected a midpoint in the range, sentencing Glover to 84 months in prison. Glover alleges that, but for the errors of his counsel, his adjusted offense level would have been 26, resulting in a range of 63-78 months imprisonment. Thus, he argues, his sentence would have been 6 to 21 months lower than

the 84-month sentence he received. Unfortunately for Glover, under Martin and Durrive, this potential decrease is not sufficiently significant to be cognizable on collateral attack.

The judgment of the district court is AFFIRMED

APP #3

3RD CASE of Level 1 printed in FULL format.

UNITED STATES OF AMERICA, Plaintiff, v. PAUL L. GLOVER, Defendant.

No. 97 C 8382, (95 CR 40)

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

1998 U.S. Dist. LEXIS 14238

September 3, 1998, Decided

DISPOSITION: [*1] Defendant's motion to vacate sentence [1] denied.

COUNSEL: For UNITED STATES OF AMERICA, plaintiff (97-CV-8382): AUSA, United States Attorney's Office, Chicago, IL.

PAUL L GLOVER, defendant (97-CV-8382), Pro se, Marion, IL.

For PAUL L GLOVER, defendant (95-CR-40): George Joseph Murtaugh, Jr., Attorney at Law, Chicago, IL.

For PAUL L GLOVER, defendant (95-CR-40): Thomas Michael Breen, Martin, Breen & Merrick, Chicago, IL.

U. S. Attorneys: Stephen Dale Anderson, United States Attorney's Office, Chicago, IL.

JUDGES: William T. Hart, UNITED STATES DISTRICT JUDGE.

OPINIONBY: William T. Hart

OPINION: MEMORANDUM OPINION AND ORDER

Following a jury trial, defendant Paul Glover was found guilty of one count of a conspiracy in violation of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. @ 1962(d); 11 counts of soliciting and receiving kickbacks in violation of 18 U.S.C. @ 1954; two counts of money laundering in violation of 18 U.S.C. @ 1956(a) (1) (B) (i); and four counts of tax evasion in violation of 26 U.S.C. @ 7206. He was sentenced to concurrent terms of incarceration with the longest term being 84 months. The term of incarceration is to be followed by [*2] three years' supervised release. Additionally, Glover was required to forfeit $ 325,000. Glover's conviction and sentence were affirmed on direct appeal, where he was represented by the same counsel who represented him at trial. See United States v. Glover, 101 F.3d 1183 (7th Cir. 1996). Less than one year after the decision on appeal became final, Glover filed his present motion pursuant to 28 U.S.C. @ 2255.

Glover presently contends that his guideline sentencing range was incorrectly calculated in that his money laundering offenses should have been grouped with his conspiracy and kickback offenses. See U.S.S. G. @ 3D1.2. He further contends that his counsel were ineffective for failing to adequately raise this issue at the time of sentencing and for failing to raise the issue at all on direct appeal. At the time of sentencing, it was determined that Glover's total

APP #4

offense level was 28 and his criminal history category was I for a guideline range of 78 to 97 months. He was sentenced to 84 months' incarceration. Had the money laundering been grouped with the conspiracy and kickback offenses, the total offense level would have been 26 and the guideline range would have been [*3] 63 to 78 months. n1 Glover's sentence would have had to have been reduced by at least 6 months and possibly up to 21 months, though it is unlikely that he would have been sentenced to the low end of the 63-78 month range since he was not sentenced on the low end of the 78-97 month range. n2

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n1 The government contends that reducing the newly grouped offense level to 26 would require that an additional level be added based on the separately grouped tax offenses being within 8 points of the 26 offense level. See U.S.S.G. @ 3D1.4(b). However, the tax offenses had an offense level of 16, not the 18 referred to in the government's brief. Perhaps the government was adding two points for obstruction of justice, but the probation officer did not recommend such an adjustment for the tax offenses and no finding to that effect was made. Since the tax offenses would be 10 levels lower than the other group, no adjustment would be made. See id. @ 3D1.4(c).

n2 The tax offenses could have been a basis for not sentencing on the low end. See U.S.S.G. @ 3D1.4(c).

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[*4]

At the time plaintiff was sentenced, the Seventh Circuit had not yet considered the particular grouping issue that Glover now attempts to raise. Other circuits had held that separate grouping was required. See, e.g., United States v. Lombardi, 5 F.3d 568, 570-71 (1st Cir. 1993) (grouping money laundering separate from conspiracy/mail fraud); United States v. Taylor, 984 F.2d 298, 303 (9th Cir. 1993) (grouping money laundering separate from wire fraud); United States v. Smith, 13 F.3d 1421, 1428 (10th Cir.), cert. denied, 513 U.S. 878 (1994) (grouping money laundering separate from mail fraud). In United States v. Wilson, 98 F.3d 281, 282-84 (7th Cir. 1996), the Seventh Circuit held that the @ 1956 money laundering offenses and mail fraud offenses involved in that case should be grouped. The government apparently concedes that Wilson would be controlling as to the grouping of Glover's conspiracy, kickback, and money laundering offenses. Glover was sentenced on September 21, 1995, his appeal was argued September 13, 1996, and the decision on appeal was issued December 2, 1996. Wilson was argued April 1, 1996 and issued October 17, 1996.

To succeed on an [*5] ineffective assistance of counsel claim, it must be shown both that counsel's performance was deficient and that the deficient performance prejudiced the defendant. Melvin v. United States, 78 F.3d 327, 329 (7th Cir.), cert. denied, 519 U.S. 963, 136 L. Ed. 2d 301, 117 S. Ct. 384 (1996). The government contends that counsel's performance could not have been deficient, at sentencing or on appeal, for failing to raise an issue that had not yet been decided by the Seventh Circuit. n3 Glover disagrees, arguing that other case law that predated the sentencing made it clear that this was a viable issue that should have been raised by effective counsel. The government also contends that Glover cannot satisfy the prejudice component of an ineffective assistance of counsel claim because the potential effect on his sentence is not significant enough to satisfy the prejudice requirement.

APP #5

Because it is held that Glover does not satisfy the prejudice requirement, it is unnecessary to consider the issue of deficient performance. See Melvin, 78 F.3d at 329.

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n3 The government also contends that counsel adequately argued the issue at sentencing. As discussed below, none of the deficiency of performance issues need be resolved. Additionally, the adequacy of trial performance issue need not be resolved because, even if the grouping issue was adequately argued at sentencing, there is no dispute that it was not raised at all on appeal.

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[*6]

Claimed errors in guideline calculations generally are not cognizable on a @ 2255 motion. Martin v. United States, 109 F.3d 1177, 1178 (7th Cir. 1996), cert. denied, 139 L. Ed. 2d 260, 118 S. Ct. 335 (1997); Durrive v. United States, 4 F.3d 548, 549-51 (7th Cir. 1993); Scott v. United States, 997 F.2d 340 (7th Cir. 1993). When, as here, the constitutional basis for relief on such a claim is ineffective assistance of counsel, the potential change of sentence must be a "significant" amount in order to satisfy the prejudice prong of an ineffective assistance of counsel claim. Martin, 109 F.3d at 1178; Durrive, F.3d at 551. Durrive involved a maximum reduction of two offense levels with a possible reduction of sentence from 120 months' incarceration to somewhere between 98 and 108 months. n4 The Seventh Circuit held this was not significant change that would satisfy the prejudice requirement. In Martin, the dispute involved a change of one criminal history category, which is equivalent to two offense levels. The effect in terms of length of incarceration was not specified. n5 The Seventh Circuit appeared to state a per se rule that a change of [*7] two offense levels would not satisfy the significant change requirement. Martin, 109 F.3d at 1178. See also United States v. Hubbard, 1997 U.S. Dist. LEXIS 16023, 1997 WL 639232 *4 (N.D. Ill. Oct. 6, 1997); Gonzalez v. United States, 967 F. Supp. 326, 332 (N.D. Ill. 1997).

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n4 The low end of the guideline range would have been 87 months, but the Seventh Circuit assumed the sentencing judge would not have gone below the middle of the guideline range.

n5 Martin's original sentence was 137 months. See United States v. Martin, 964 F.2d 714, 716 (7th Cir. 1992); United States v. Martin, 1995 U.S. Dist. LEXIS 3459, 1995 WL 124126 *4 (N.D. Ill. March 20, 1995).

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

The Seventh Circuit has not directly addressed the question of how much time would actually be enough to satisfy the significant change requirement. In Martin, 109 F.3d at 1178, the court states: "Although we recognized in Durrive that any extra time in prison is significant from the defendant's perspective, we adopted a rule of proportionality: the sort of increase produced by a few [*8] levels' difference in sentencing calculations cannot be raised indirectly on collateral attack by complaining about counsel's work." This implies that a change of more than a few levels can be significant. But even taking that

APP #6

implication as authoritative, "few" is not a precise term and the Seventh Circuit does not indicate how the difference in length of sentence should be considered. And by referring to proportionality, the Seventh Circuit may be indicating that the percentage change in sentence is also to be considered--a one-year increase doubling a one-year sentence may be considered significant even if a one-year increase to a 30-year sentence is not.

The present case arguably involves a potential change in sentence that is slightly larger (proportionally) than that involved in Durrive. Durrive involved an offense level change from 30 to 28 n6 and a sentence reduction of 10 to 18.3 per cent. n7 The present case involves an offense level change from 28 to 26 and a sentence reduction of 7.1 to 25 per cent. n8 The potential sentence reduction in the present case is not large enough to satisfy the significant change requirement of Durrive and Martin and other cases [*9] have so held as to proportionally larger changes. See Unger v. United States, 8 F. Supp. 2d 1151, 1998 U.S. Dist. LEXIS 9303, 1998 WL 337476 *3 (E.D. Wis. June 22, 1998) (reduction in total offense level from 28 to 24); Davis v. United States, 1998 U.S. Dist. LEXIS 3624, 1998 WL 142369 *3 (N.D. Ill. March 19, 1998) (two-level reduction changing the sentence of incarceration from 51 months to 37 months). Because the error claimed in the present case did not have a significant effect on Glover's sentence, he does not state any basis for granting @ 2255 relief.

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - - -

n6 United States v. Durrive, 902 F.2d 1221, 1231 n.8 (7th Cir. 1990), indicates that Durrive's total offense level was 30 (28 plus a two-level enhancement). With a criminal history category of II, a two-level change would have changed his guideline range from 108-135 to 87-108, the ranges referred to in Durrive, 4 F.3d at 549, 551.

n7 120 months reduced by 12 to 22 months.

n8 84 months reduced by 6 to 21 months. However, if like Durrive, it is not assumed that the potential reduction is to the low end, but instead is to 6 above the low end as was the original sentence, then the maximum reduction is to 69, for a percentage change of 17.9 per cent (15/84).

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

[*10]

IT IS THEREFORE ORDERED that defendant's motion to vacate sentence [1] is denied. The Clerk of the Court is directed to enter judgment in favor of the government and against defendant denying the @ 2255 motion. If defendant wishes to appeal this order, he must file a Notice of Appeal to the United States Court of Appeals for the Seventh Circuit with the Clerk of the Court, United States District Court for the Northern District of Illinois, 219 South Dearborn Street, 20th Floor, Chicago, Illinois 60604, within sixty (60) days of the entry of the judgment in this case. Any notice of appeal should be accompanied by a request for a certificate of appealability, including a statement as to why a certificate should issue. See 28 U.S.C. @ 2253; Fed. R. App. P. 22(b); 7th Cir. R. 22.1.

ENTER:

APP #7

William T. Hart

UNITED STATES DISTRICT JUDGE

Dated: SEPTEMBER 3, 1998

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came to hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that pursuant to Memorandum Opinion and Order dated September 3, 1998, judgment is entered in favor of the United States [*11] of America and against defendant Paul L. Glover denying the @ 2255 motion.

Date: 9/3/1998

APP #8

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

October 7, 1999

Before

Hon. DANIEL A. MANION, *Circuit Judge*

Hon. MICHAEL S. KANNE, *Circuit Judge*

Hon. DIANE P. WOOD, *Circuit Judge*

PAUL L. GLOVER,
Petitioner-Appellant,

No. 98-4021 v.

UNITED STATES of AMERICA,
Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

No. 97 C 8382

William T. Hart, *Judge.*

ORDER

Petitioner-appellant filed a petition for rehearing and petition for rehearing en banc. No judge in regular active service has requested a vote on the petition for rehearing en banc, and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED

APPENDIX C

No. _____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1999

PAUL L. GLOVER, PETITIONER

v.

UNITED STATES, RESPONDENT

CERTIFICATE OF SERVICE

Pursuant to this Court's Rule 29.5(b), I certify that I am a member of the Bar of this Court. I further certify that on March 6, 2000, at the time of hand delivery to this Court, I served three copies of the foregoing Petition for Certiorari and the Motion to Proceed In Forma Pauperis, pursuant to Rules 29.3 and 29.4(a), on counsel for the respondent, whose telephone number is (202) 514-2201, by depositing a copy of the same, first class postage prepaid, in the United States mails, addressed to:

Seth P. Waxman, Esq.
Solicitor General of the United States
U. S. Department of Justice, Room 5614
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

As a result, I state pursuant to Rule 29.5 that all parties required to be served have been served.

MICHAEL WALDMAN
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Counsel for the Petitioner

ORIGINAL

Supreme Court, U.S.
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MAY 22 2000
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No. 99-8576

IN THE SUPREME COURT OF THE UNITED STATES

PAUL L. GLOVER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record

JAMES K. ROBINSON
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17pp

QUESTION PRESENTED

Whether the court of appeals erred in rejecting petitioner's claim that his lawyers' failure to prevail on a particular Sentencing Guidelines argument before the district court, and their failure to renew that argument on direct appeal, constituted ineffective assistance of counsel.

IN THE SUPREME COURT OF THE UNITED STATES

No. 99-6576

PAUL L. GLOVER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is not reported, but the judgment is noted at 182 F.3d 921 (Table).

JURISDICTION

The judgment of the court of appeals was entered on July 15, 1999. A petition for rehearing was denied on October 7, 1999 (Pet. App. 8a). On December 16, 1999, Justice Stevens extended the time for filing a petition for a writ of certiorari to and including March 5, 2000, and the petition was filed on March 6 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on one count of racketeering conspiracy, in violation of 18 U.S.C. 1962(d); eleven counts of soliciting and receiving kickbacks, in violation of 18 U.S.C. 1954; two counts of money laundering, in violation of 18 U.S.C. 1956(a)(1)(B)(i); and four counts of filing false tax returns, in violation of 26 U.S.C. 7206. He was sentenced to 84 months' imprisonment, to be followed by three years of supervised release, and ordered to forfeit $325,000 and pay the cost of his prosecution. The court of appeals affirmed. United States v. Glover, 101 F.3d 1183 (7th Cir. 1996).

Petitioner thereafter filed a motion under 28 U.S.C. 2255 to vacate, set aside, or correct his sentence. The district court denied that motion, Pet. App. 3a-7a, and the court of appeals affirmed, id. at 1a-2a.

1. Petitioner was the Vice-President and General Counsel of the Chicago Truck Drivers, Helpers and Warehouse Workers Union (Independent) (the Union), a national labor union with more than 5,000 members, most of whom reside in the Chicago area. Petitioner was the Fund Manager, as well as a trustee, of the Union's Health and Welfare Fund, and was responsible for managing the Fund's day-to-day operations. He was also a trustee of the Union's Pension Fund. Petitioner was not authorized to make investment decisions for the Health and Welfare Fund without the

direction of that Fund's full Board of Trustees. See Glover, 101 F.3d at 1185.

Between 1986 and 1992, petitioner engaged in unauthorized transactions and made unauthorized investments with money from the Union's Pension and Health and Welfare Funds, for the purpose of obtaining kickbacks for himself and others. Glover, 101 F.3d at 1186-1188. Petitioner was eventually convicted of participating in a racketeering conspiracy, two counts of money laundering, 11 counts of soliciting and accepting illegal kickbacks, and four counts of filing false tax returns.

2. In determining petitioner's sentence, the district court concluded, over objection by petitioner's counsel, that petitioner's kickback offenses, his money laundering offenses, and his tax offenses should be "grouped" separately for purposes of determining his base offense level under the federal Sentencing Guidelines. See generally Guidelines § 3D1.2(d). The court then computed petitioner's base offense level as 24. It increased that level by two levels for obstruction of justice, because it concluded that petitioner had perjured himself at his first trial, and by an additional two levels because petitioner's offenses fell into more than one group of closely related counts. See Guidelines § 3D1.4. The resulting offense level of 28, combined with petitioner's criminal history category of I, produced a Guidelines sentencing range of 78 to 97 months' imprisonment, and the district court imposed a sentence of 84 months. Glover, 101 F.3d at 1189; Pet. App. 1a, 3a-4a.

3. Petitioner did not renew on direct appeal his objection to the district court's grouping of his offenses for Guidelines purposes. In a later motion filed under 28 U.S.C. 2255, however, petitioner again claimed that his money laundering offenses should have been grouped with his conspiracy and kickback offenses under Guidelines § 3D1.2. He argued that his previous counsel rendered constitutionally ineffective assistance by failing to press that argument "adequately" at sentencing, and by failing to raise it at all on direct appeal. Pet. App. 3a. Petitioner contended that, under a proper application of the Guidelines, his offense level should have been reduced from level 28 to level 26, his Guidelines range should have been 63-78 months' imprisonment, and his sentence should accordingly have been between 6 and 21 months lower than the 84 months imposed by the district court. Pet. App. 3a-4a.

The district court denied petitioner's motion. Pet. App. 3a-7a. The court held that even if counsel's failure to raise the grouping issue on appeal were considered constitutionally deficient, the potential sentence reduction resulting from the claimed error (6 to 21 months) was not sufficiently significant to establish the "prejudice" required to make out a claim of ineffective assistance under Strickland v. Washington, 466 U.S. 668 (1984). Pet. App. 5a-6a.

The court of appeals affirmed the denial of collateral relief. Pet. App. 1a-2a. In a short per curiam opinion, the court endorsed the district court's reasoning:

> Even if we were to assume that [petitioner's] attorneys performed inadequately [under Strickland], the second prong, prejudice, is missing here. [Petitioner] argues that his attorneys' failure to argue the correct interpretation of U.S.S.G. § 3D1.2 led to an adjusted offense level two levels higher than it should have been. This court has held that only a significant increase in the sentence rises to the level of the type of prejudice that will support an ineffective assistance of counsel claim on collateral attack.

Id. at 1a. The court held that a "potential decrease" of 6-21 months' imprisonment was "not sufficiently significant to be cognizable on collateral attack." Id. at 2a.

ARGUMENT

Petitioner contends that the court of appeals erred in applying the prejudice standard of Strickland v. Washington, 466 U.S. 668 (1984), to his claim of ineffective assistance of counsel at sentencing and on appeal (Pet. 8-14, 20-22), and that the Seventh Circuit's approach to evaluating such claims in cases involving application of the federal Sentencing Guidelines differs from that followed by other courts of appeals (Pet. 14-20). Those contentions do not warrant review in this case.

1. Claims of non-constitutional error are cognizable on collateral review only if they go to jurisdiction, or allege some other "fundamental defect" in the original proceedings that would, if substantiated, "inherently result in a complete miscarriage of justice." United States v. Addonizio, 442 U.S. 178, 185 (1979); see Reed v. Farley, 512 U.S. 339, 353-354 (1994); United States v. Timmreck, 441 U.S. 780, 784 (1979); Davis v. United States, 417 U.S. 333, 346 (1974); Hill v. United States, 368 U.S. 424, 428 (1962). Thus, "an error that may justify reversal on

direct appeal will not necessarily support a collateral attack on a final judgment." Addonizio, 442 U.S. at 184. In particular, "[b]arring extraordinary circumstances, * * * an error in the application of the Sentencing Guidelines cannot be raised" in a proceeding under 28 U.S.C. 2255, United States v. Pregent, 190 F.3d 279, 283-284 (4th Cir. 1999) (collecting cases), because "errors of guideline interpretation or application ordinarily fall short of a miscarriage of justice." United States v. Mikalajunas, 186 F.3d 490, 496 (4th Cir. 1999) (same), cert. denied, 120 S. Ct. 1283 (2000); see also, e.g., Jones v. United States, 178 F.3d 790, 796 (6th Cir.), cert. denied, 120 S. Ct. 335 (1999); cf. United States v. Talk, 158 F.3d 1064, 1069 (10th Cir. 1998) (assuming, without deciding, that a claim of a nine-level Guidelines error that would reduce a 108-month sentence by more than 50 months would be cognizable), cert. denied, 525 U.S. 1164 (1999).[1]

In light of these restrictions, Section 2255 petitioners commonly seek to raise arguments concerning Guidelines sentencing

---

[1] Because petitioner did not raise his Guidelines claim before the court of appeals, even if such a claim were generally cognizable on collateral review, petitioner would have to show cause for his procedural default, and prejudice resulting from it. See United States v. Frady, 456 U.S. 152, 167-168 (1982); Murray v. Carrier, 477 U.S. 478, 492 (1986). In the circumstances of this case, a showing that establishes ineffective assistance of counsel under Strickland would likely also suffice to demonstrate cause and prejudice under Frady. See Murray, 477 U.S. at 488 (ineffective assistance satisfies "cause" requirement); see also id. at 496; Strickland, 466 U.S. at 694, 697-698; cf. Strickler v. Greene, 527 U.S. 263, 282, 296 (1999) (treating inquiries into prejudice under separate tests as substantially "parallel").

as petitioner does here (see, e.g., Pet. 9), by alleging that their previous lawyers rendered constitutionally ineffective assistance of counsel by failing to press those arguments adequately at trial or on appeal. As petitioner acknowledges (ibid.), however, an ineffective assistance claim may be made out only by demonstrating first that counsel's performance fell "outside the wide range of professionally competent assistance," and second that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 690, 694. Petitioner cannot meet that demanding standard.

a. To satisfy the first prong of the Strickland test, petitioner must establish that, with specific respect to his present Sentencing Guidelines claim, his former lawyers' performance was so deficient that they were "not functioning as the 'counsel' guaranteed by the Sixth Amendment." Strickland, 466 U.S. at 687. In analyzing such a claim, courts must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," and "every effort must be made to eliminate the distorting effects of hindsight * * * and to evaluate the conduct from counsel's perspective at the time." Id. at 689. Where the alleged error is the omission of a particular claim from the brief filed for petitioner on appeal, it must be borne in mind that the "process of 'winnowing out weaker arguments on appeal and focusing on' those more likely to prevail, far from being evidence of incompetence, is the hallmark

of effective appellate advocacy." Smith v. Murray, 477 U.S. 527, 536 (1986) (quoting Jones v. Barnes, 463 U.S. 745, 751-752 (1983)); see also Smith v. Robbins, 120 S. Ct. 746, 765 (2000) ("[I]t is still possible to bring a Strickland claim based on counsel's failure to raise a particular claim, but it is difficult to demonstrate that counsel was incompetent").

Here, the Presentence Report (PSR) prepared for petitioner's sentencing proposed grouping the money laundering and kickback counts together. The government objected, and the district court took the matter up at the sentencing hearing. Petitioner's counsel argued that the convictions resulted from "one joint effort" by petitioner and his co-conspirators, and that they were "appropriately grouped" by the PSR. Sent. Tr. 3-4. The court disagreed, and computed petitioner's Guidelines range by grouping the counts separately.[2] Petitioner's counsel chose not to raise that issue on appeal, focusing instead on other claims of trial and sentencing error. See United States v. Glover, 101 F.3d 1183, 1185 (7th Cir. 1996). In hindsight that decision may have been unfortunate, in light of the Seventh Circuit's decision, in

[2] At the time of petitioner's sentencing in September 1995, the Seventh Circuit had not considered the grouping issue, and several other circuits had sustained separate grouping in similar cases. Pet. App. 4a (citing United States v. Lombardi, 5 F.3d 568, 570-571 (1st Cir. 1993); United States v. Taylor, 984 F.2d 298, 303 (9th Cir. 1993); United States v. Smith, 13 F.3d 1421, 1428 (10th Cir.), cert. denied, 513 U.S. 878 (1994)). There was also authority in other circuits to support grouping money laundering and fraud counts together. See United States v. Leonard, 61 F.3d 1181, 1185-1186 (5th Cir. 1995); United States v. Cusumano, 943 F.2d 305, 312-313 (3d Cir. 1991), cert. denied, 502 U.S. 1036 (1992).

an opinion issued a month after the argument in petitioner's case, to require grouping in a case involving money laundering and mail fraud offenses. United States v. Wilson, 98 F.3d 281 (7th Cir. 1996). Considering the matter from counsel's perspective at the time they acted, however, the omitted claim was not "clearly stronger than [the] issues that counsel did present." Smith v. Robbins, 120 S. Ct. at 766. There is accordingly no reason to conclude that counsel's "winnowing" of the issues for appeal was "an unreasonable [decision] that only an incompetent attorney" would have made, see Garrett v. United States, 78 F.3d 1296, 1305 (8th Cir.), cert. denied, 519 U.S. 956 (1996), or otherwise represented anything other than a tactical choice falling "well within the 'wide range of professionally competent assistance' required under the Sixth Amendment." Smith v. Murray, 477 U.S. at 536 (quoting Strickland, 466 U.S. at 690).[3]

b. The court of appeals, focusing on the "prejudice" prong of Strickland, took a different route to the conclusion that petitioner's ineffective-assistance claim lacks merit. That court has previously noted that "[a]lmost any error at sentencing may be recast as a challenge to counsel," and has stressed the need to prevent ineffective-assistance claims from becoming "the means of vindicating on collateral attack all manner of arguments

[3] If failure to raise any arguable Guidelines issue on appeal were an error amounting to deficient performance, cf. Pet. 22-23 & n.10, and if any potential increase in a defendant's sentence were deemed inherently "prejudicial," see Pet. 12-14, then there would be little left of the rule against collateral review of routine sentencing claims, see pp. 5-6, supra.

under rules and statutes." Durrive v. United States, 4 F.3d 548, 550 (7th Cir. 1993). Focusing on the concern expressed in Lockhart v. Fretwell, 506 U.S. 364 (1993), with reliability and fundamental fairness, as those concepts have been understood in the context of collateral review, Durrive held that while "[g]rave errors by judge and counsel might make a sentence under the Guidelines 'unreliable or . . . fundamentally unfair,'" a likely difference in sentence must be "significant" before it can amount to the "prejudice" required to establish a Sixth Amendment violation and justify collateral review. Id. at 551. By contrast, the court observed, "[a]djusting the offense level by two or three steps is exactly the [sort of] routine decision that is supposed to be handled at sentencing and on direct appeal." Ibid. Applying that test here, the court of appeals held that the potential difference in sentence involved in petitioner's claim that his Guidelines range should have been "6 to 21 months lower than the 84-month sentence he received * * * is not sufficiently significant to be cognizable on collateral attack." Pet. App. 1a-2a.

2. Petitioner contends (Pet. 14-20) that the Seventh Circuit's approach to the prejudice inquiry in Guidelines sentencing cases conflicts with that of other courts of appeals.[4] Any such

[4] Petitioner also argues (Pet. 12-13) that the Durrive rule cannot be reconciled with cases such as Argersinger v. Hamlin, 407 U.S. 25, 37 (1972), which held that a defendant has the right to counsel in any proceeding that results in imprisonment. There is, however, a fundamental difference between cases like Argersinger, in which the defendant had no counsel at all, and cases like this one, in which the defendant was represented throughout

conflict is irrelevant to the outcome of this case, because petitioner cannot demonstrate that his counsel's performance was deficient, so that his ineffectiveness claim fails without regard to prejudice. See pp. 7-9, supra. In any event, any divergence in approach among the courts of appeals would not warrant review at this time.

As petitioner notes (Pet. 18-19), the Tenth Circuit relied on Durrive's analysis in United States v. Kissick, 69 F.3d 1048, 1055-1056 (1995).[5] Durrive itself relied on Spriggs v. Collins, 993 F.2d 85, 88 (5th Cir. 1993), which cautioned that "[i]n order to avoid turning Strickland into an automatic rule of reversal [on collateral review] in the non-capital sentencing context, * * * a court must determine whether there is a reasonable probability that but for trial counsel's errors the defendant's non-capital sentence would have been significantly less harsh."

In one of the two published opinions in which other courts of appeals have expressly addressed Durrive, the Fifth Circuit has recently suggested that Durrive may have read Spriggs too

the proceedings, but later claims that his lawyer's performance fell below constitutionally acceptable standards in one or more respects. Where a defendant had no counsel, prejudice is presumed; but where the claim is ineffectiveness, it must be demonstrated. See, e.g., Roe v. Flores-Ortega, 120 S. Ct. 1029, 1037-1038 (2000); Smith v. Robbins, 120 S. Ct. at 764-765.

[5] Kissick held that an error that would have reduced the applicable Guidelines range from 324-405 months to 262-327 months was prejudicial under the Durrive standard, where the district court had characterized the applicable provisions as "harsh" and had sentenced the defendant to 328 months, near the lower end of the range it thought applicable. No court of appeals other than the Seventh Circuit has published a decision relying on the Durrive test to reject a claim of ineffective assistance.

broadly. United States v. Phillips, No. 98-50062, 2000 WL 390496, at *4-*5 & n.4 (Apr. 18, 2000). In the second such opinion, the Sixth Circuit, while agreeing with Durrive that "'slight failings' by counsel" should not be sufficient to justify collateral relief, has "question[ed]" whether that issue is best addressed under the "prejudice" prong or the "performance" prong of Strickland. See Arredondo v. United States, 178 F.3d 778, 784 (1999). Neither Phillips nor Arredondo, however, involved a sentencing error that would likely have failed the Seventh Circuit's "significance" test. See Phillips, 2000 WL 390496, at *4 (increase of at least 37 months); Arredondo, 178 F.3d at 784 (declining to resolve "degree of prejudice" required because "[e]ven under a heightened standard * * * [an error] which may have increased [the] sentence by as much as eight years" is sufficient to show prejudice).

The remaining cases petitioner cites (Pet. 15-19) do not discuss Durrive, and also involved different facts (as well as often distinct legal claims), including longer potential increases in sentence than the 6-21 months at issue in this case. In United States v. Granados, 168 F.3d 343, 345-346 (8th Cir. 1999) (per curiam), for example, the court held that the defendant had shown Strickland prejudice where he "was sentenced to serve an additional forty to fifty months because his attorney was not familiar with the Guidelines and failed to challenge the government's breach of its plea agreement," and where the defendant might not have pleaded guilty if he had been competently

advised. Similarly, in United States v. Thompson, 27 F.3d 671, 675 (D.C. Cir.), cert. denied, 513 U.S. 1050 (1994), a case resolved on direct appeal (rather than on collateral review), the court sorted out a somewhat confused set of factual and legal contentions by concluding that if he had been properly advised the defendant might have pleaded guilty earlier, entitling him to a further reduction in offense level and thus to a reduction in sentence of 33-98 months. In United States v. Soto, 132 F.3d 56 (D.C. Cir. 1997), also on direct appeal, the court found prejudice from a potential sentencing difference of 17-30 months. These cases do not establish any conflict with the Seventh Circuit's approach. Compare Paters v. United States, 159 F.3d 1043, 1045-1047 & n.4 (7th Cir. 1998) (Durrive test does not apply to allegation that but for deficient counsel, defendant would have pleaded guilty; suggesting in dictum that 24-43 month potential reduction in sentence would be "significant" under Durrive).[6]

---

[6] See also United States v. Ford, 918 F.2d 1343, 1350 (8th Cir. 1990) (decided on direct appeal) (difference of at least 38 months was "so serious that it deprived [the defendant] of a fair sentence"); United States v. Ford, 983 F.2d 897, 898-899 (8th Cir. 1993) (in same case on later collateral proceedings, defendant barred from raising further sentencing challenges; while Section 2255 petition "summarily mentioned ineffective assistance as cause to excuse his default" of those issues on appeal, "he has failed to show that appellate counsel performed deficiently in failing to raise these issues on direct appeal, and that counsel's deficient performance prejudiced him," citing Strickland). United States v. Palomba, 31 F.3d 1456, 1465-1466 (9th Cir. 1994) (a direct appeal case), and Jackson v. Leonardo, 162 F.3d 81, 86 (2d Cir. 1998), both involved challenges to the validity of one of the defendant's convictions, not merely claims of error under the Sentencing Guidelines.

Finally, even if there were a square conflict in the circuits, review would not be appropriate at the present time. In adopting the Durrive rule, the Seventh Circuit relied heavily on this Court's reasoning in Lockhart v. Fretwell. See Durrive, 4 F.3d at 550-551. This Court has recently clarified the meaning and scope of Lockhart's statement, on which Durrive relied, that "[a]n analysis focussing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective." See Williams v. Taylor, supra, slip op. 27-33. Moreover, the Fifth Circuit has recently questioned Durrive's reading of that court's decision in Spriggs, on which the Seventh Circuit also relied to some extent. United States v. Phillips, supra. Until the Seventh Circuit has had a chance to reassess Durrive's reasoning in light of Williams and Phillips, review of the issue by this Court would be premature.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

JAMES K. ROBINSON
Assistant Attorney General

JUAN C. ZARATE
Attorney

MAY 2000

IN THE SUPREME COURT OF THE UNITED STATES

GLOVER, PAUL L. Petitioner	)	
vs.	)	No. 99-8576
USA	)	

CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served copies of the **BRIEF FOR THE UNITED STATES IN OPPOSITION** by first class mail, postage prepaid, on this 22nd day of May 2000.

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May 22, 2000

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ORIGINAL

No. 99-8576

IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

PAUL L. GLOVER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

ARGUMENT 2

1. This Case Presents An Issue Of Recurring Importance 2

2. The Seventh Circuit's "Significant Prejudice" Requirement Is Contrary To Supreme Court Precedent 3

3. This Case Clearly Presents The Issue Of The "Significant Prejudice" Requirement 4

4. The Seventh Circuit's Interpretation Of "Prejudice" Conflicts With Other Circuits And District Courts 4

CONCLUSION 6

TABLE OF AUTHORITIES

Page

Cases

Allen v. United States, 175 F.3d 560 (7th Cir.) 5

Argersinger v. Hamlin, 407 U.S. 25 (1972) 3

Lockhart v. Fretwell, 506 U.S. 364 (1993) 3

Martin v. United States 109 F.3d 1177 (7th Cir. 1996) 6

Robinson v. United States, 196 F.3d 748 (7th Cir. 1999) 5

Spriggs v. Collins, 993 F.2d 85 (5th Cir. 1993) 5

Strickland v. Washington, 466 U.S. 688 (1984) ..... passim

United States v. Paz, 1997 WL 158338 (N.D. Ill., March 31, 1997) 5

United States v. Phillips, 210 F.3d 345 (5th Cir. 2000) 5, 6

United States v. Wilson, 98 F.3d 281 (7th Cir. 1996) 4

United States v. Williamson, 183 F.3d 458 (5th Cir. 1999) 4

Williams v. Taylor, 210 S. Ct. 1495 (2000) 5, 6

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

No. 99-8576

PAUL L. GLOVER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

The Respondent's brief puts forward no sound justification for denying this petition for a writ of certiorari. The Government nowhere disputes that this case presents an important and recurring issue which will affect numerous individuals. The Government also makes no serious effort to defend the constitutional merits of the Seventh Circuit's "significant prejudice" rule. Rather, the Government attempts to divert attention by arguing that petitioner Glover failed to satisfy the "deficient performance" prong of *Strickland*. Putting aside the blatant nature of the error of Mr. Glover's counsel – failing to raise a dispositive Seventh Circuit case in Glover's favor – it should be recognized that both the federal district court and appeals court relied solely

on the "prejudice" prong of *Strickland* in deciding this case. Furthermore, contrary to its intention, the Government's review of the various courts of appeals' opinions relating to the "signficant prejudice" requirement only confirms the conflict among the circuits on this issue.

ARGUMENT

1. This Case Presents An Issue of Recurring Importance.

The Government does not, and could not, dispute that this case presents an issue of recurring importance. As Glover's Petition noted, courts in the Seventh Circuit alone have applied this "significant prejudice" rule to deny relief to wrongfully sentenced prisoners in more than a dozen reported decisions. *See* Pet., at 23 & n.11. Numerous decisions also exist from the other courts of appeals. *Id.* at 14-20. Moreover, countless cases of counsel's mistakes in interpreting the Sentencing Guidelines go unreported. The "significant prejudice" rule is the current state of the law in the Seventh Circuit and several other circuits. *Id.* The grant of the writ of certiorari is necessary to review whether the courts in these circuits are misinterpreting the Constitution and this Court's precedents relating to the ineffective assistance of counsel and the sentencing guidelines.

The importance of this case is underscored by the amicus brief filed by the Families Against Mandatory Minimums Foundation ("FAMM"). FAMM is a nonprofit, nonpartisan organization which has 30 chapters and 18,000 members nationwide. FAMM's special area of expertise involves sentencing issues. Based on its study of the issue, FAMM "believes that attorney error in Guidelines sentencing is a recurring problem" and that the questions presented by this petition "are important to the administration of federal criminal justice." FAMM Br., at

2-3. Nowhere does the Government challenge FAMM's conclusions or otherwise dispute the wide-ranging impact of the "significant prejudice" requirement at issue in this case.[1]

2. The Seventh Circuit's "Significant Prejudice" Requirement Is Contrary To Supreme Court Precedent

The Government's brief also is noteworthy for its lack of any real defense of the merits of the Seventh Circuit's rule. While the Government asserts that errors of sentencing guideline interpretation ca not usually be raised on habeas and that prisoners often attempt to raise these sentencing issues by alleging constitutionally ineffective assistance of counsel, Gov. Opp., at 6-7, the Government does not explain how that justifies the "significant prejudice" requirement. Tellingly, the Government makes no attempt to set out the constitutional underpinnings of this Seventh Circuit test. The Government fails to point out where in *Strickland v. Washington*, 466 U.S. 688 (1984), there is any support for a "significant prejudice" requirement. The Government also fails to explain how *Lockhart v. Fretwell*, 506 U.S. 364 (1993), or any other Supreme Court opinion supports a "significant prejudice" test. In fact, the entire Government's brief is bereft of any discussion of the constitutional derivation or justification for the Seventh Circuit's rule.[2]

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1 Counsel for petitioner has taken this representation on a pro bono basis because of the importance of the legal question presented by this case.

2 The extent of the Government's constitutional 'analysis' is found in its footnote 4. There, the Government attempts to refute petitioner's argument that the Seventh Circuit's rule is inconsistent with *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972) and other cases which hold that a defendant is entitled to counsel in any case resulting in imprisonment, even if the imprisonment is only a few months. *Id.* The Government argues that the Supreme Court cases are distinguishable because they involve no counsel at all, rather than ineffective assistance of counsel. Yet, the Government never explains why this distinction makes any difference. The basic principle of those cases is directly applicable here – even a few months additional imprisonment is 'significant' for Sixth Amendment purposes. *Argersinger*, 407 U.S. at 37.

3. This Case Clearly Presents The Issue Of The "Significant Prejudice" Requirement

Rather than defend the "significant prejudice" requirement, the Government spends pages arguing that the performance of Glover's counsel was not professionally deficient as required by *Strickland's* first prong. Gov. Opp., at 7-9. This argument is a red-herring. In fact, *the Government never raised the issue of the first prong of Strickland in the court of appeals below.* The federal district court and court of appeals never asserted that Mr. Glover's counsel had satisfied the appropriate professional standard. Instead, both the district and appellate courts decided this case against Glover *solely* on the grounds that Mr. Glover could not satisfy the "significant prejudice" requirement under *Strickland's* second prong. This is not a case where there are alternative legal bases for the decision of the lower court. Rather, this case presents only one issue – whether there is a "significant prejudice" requirement for ineffective assistance of counsel under the Sixth Amendment which is not satisfied by between 6 and 21 months of additional (and incorrect) imprisonment.[3]

4. The Seventh Circuit's Interpretation Of "Prejudice" Conflicts With Other Circuits and District Courts

The Government also attempts to deny that there is any divergence in approach among the courts of appeal, arguing that the numerous cases cited by petitioner involved "longer

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3 Furthermore, it is readily apparent that Mr. Glover's counsel was deficient. He failed to bring the favorable controlling decision in *United States v. Wilson*, 98 F.3d 281 (7th Cir. 1996), to the Seventh Circuit's attention, even though Mr. Glover's appeal was still pending at the time. "Solid, meritorious arguments based on directly controlling precedent should be discovered and brought to the court's attention. . . . [C]ounsel, by failing to cite directly controlling precedent, rendered deficient assistance." *United States v. Williamson*, 183 F.3d 458, 463 (5th Cir. 1999).

potential increases in sentence than the 6-21 months at issue in this case." Gov. Opp., at 12. Yet, the Seventh Circuit has found that a 42 additional month imprisonment is "insignificant." *Allen v. United States*, 175 F.3d 560, 563 (7th Cir.), *cert denied*, 120 S. Ct. 432 (1999); *see also Robinson v. United States*, 196 F.3d 748, 754 (7th Cir. 1999) (32 additional months in prison; no prejudice); *United States v. Paz*, 1997 WL 158338 (N.D. Ill. March 31, 1997) (41 additional months in prison; no prejudice). Furthermore, the Seventh Circuit has adopted a *per se* rule that "significant prejudice" requires a mistake of more than two offense levels. *See* Pet., at 14 & n. 5. Because the cases from the other circuit courts involve a change of two or less offense levels, these decisions conflict with the Seventh Circuit rule. *Id.*, at 14-20.

Moreover, in the recent case of *United States v. Phillips*, 210 F.3d 345, 351-52 (5th Cir. 2000), the Fifth Circuit admitted that its approach expressly conflicts with the Seventh Circuit. In granting the habeas petition, the Fifth Circuit in *Phillips* acknowledged that the Seventh Circuit would reach a different result. The *Phillips* Court noted that, although both the Fifth and Seventh Circuits rely on the decision in *Spriggs v. Collins*, 993 F.2d 85 (5th Cir. 1993), the Seventh Circuit "ignored our direction that demonstrably erroneous enhancements would still justify relief regardless of their 'significance,' and it correspondingly ignored our above-noted rationale for imposing the 'significant prejudice' requirement." *Phillips*, 210 F.3d at n. 4 (citations omitted). Thus, even those courts adopting the "significant prejudice" test have explicitly clashed as to its interpretation and application.

Lastly, the Government appears to argue that granting certiorari is unnecessary because *Phillips* and the recent Supreme Court decision in *Williams v. Taylor*, 120 S. Ct. 1495 (2000), may lead the Seventh Circuit to "reassess" its "significant prejudice" requirement. Gov. Opp., at 14. This is wishful thinking in the extreme. There is no reason to believe that the Seventh

Circuit has any intention to revisit this rule. The *Phillips* decision is only an opinion of a panel from another circuit, while *Williams* is not written with this "significant prejudice" issue in mind and is not so explicit as to compel the Seventh Circuit to reverse itself on this issue. The "significant prejudice" rule was the subject of a vehement dissent from a denial of rehearing en banc by three judges less than three years ago. *See Martin v. United States*, 109 F.3d 1177, 1178 (7th Cir. 1996) (Judge Rovner, dissenting). The very reasoning found in *Phillips* and *Williams* was presented vigorously in that dissent, but to no avail. The "significant prejudice" requirement is firmly established in the Seventh Circuit and has been applied by that court on numerous occasions. *See* Pet., at n. 11. It will continue to be used to keep individuals in prison for longer than their correct, lawful term, unless this Court grants this petition.

CONCLUSION

For the reasons stated in the petition and in this brief, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. 99-8576

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1999

PAUL L. GLOVER, PETITIONER

v.

UNITED STATES, RESPONDENT

CERTIFICATE OF SERVICE

Pursuant to this Court's Rule 29.5(b), I certify that I am a member of the Bar of this Court. I further certify that on June 2, 2000, at the time of hand delivery to this Court, I served three copies of the foregoing Reply Brief in Support of Petition for a Writ of Certiorari, pursuant to Rules 29.3 and 29.4(a), on counsel for the respondent, whose telephone number is (202) 514-2201, and amicus curiae, by depositing a copy of the same, first class postage prepaid, in the United States mails, addressed to:

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As a result, I state pursuant to Rule 29.5 that all parties required to be served have been served.

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No. 99-8576

In The

Supreme Court of the United States

PAUL L. GLOVER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF AMICUS CURIAE FAMILIES AGAINST MANDATORY MINIMUMS FOUNDATION IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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20 pp

QUESTIONS PRESENTED

1. Whether the court of appeals erred in holding that an additional six to twenty-one months in prison due to counsel's error relating to the Sentencing Guidelines fails to satisfy the "prejudice" prong of *Strickland v. Washington*, 466 U.S. 668 (1984).

2. Whether the court of appeals erred in holding that a two-level error in the offense level under the Sentencing Guidelines was *per se* insufficient to satisfy the "prejudice" prong of *Strickland v. Washington*, 466 U.S. 668 (1984), even where this two-level error resulted in the petitioner being sentenced to an additional six to twenty-one months in prison.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

INTERESTS OF AMICUS CURIAE 1

SUMMARY OF THE ARGUMENT 3

REASONS FOR GRANTING THE WRIT 3

The questions presented are important to the administration of federal criminal justice, and the Seventh Circuit's opinion is inconsistent with this Court's precedent and decisions of other circuits

1. There exists a circuit conflict that is ripe for this Court's review 4

2. The Seventh Circuit's "significant prejudice" test exacerbates a significant problem in the representation of federal criminal defendants 5

3. Reversing the Seventh Circuit's "significant prejudice" test would not open the floodgates to a deluge of collateral sentencing litigation 9

4. The Seventh Circuit's holding that an additional six to twenty-one months in prison is not "significant prejudice" is inimical to the rights guaranteed by the Fifth and Sixth Amendments 12

CONCLUSION 15

TABLE OF AUTHORITIES

Page

CASES

Allen v. United States, 175 F.3d 560 (7th Cir. 1999) 11

Argersinger v. Hamlin, 407 U.S. 25 (1972) 13

County of Riverside v. McLaughlin, 500 U.S. 44 (1991) 13

Durrive v. United States, 4 F.3d 548 (7th Cir. 1993) 7, 9, 10, 12

Jackson v. Leonardo, 162 F.3d 81 (2d Cir. 1998) 4

Martin v. United States, 109 F.3d 1177 (7th Cir. 1996) 7, 8, 9, 12

Scott v. Illinois, 440 U.S. 367 (1979) 13

Spriggs v. Collins, 993 F.2d 85 (5th Cir. 1993) .. 5, 10, 11

Stack v. Boyle, 342 U.S. 1 (1951) 14

Strickland v. Washington, 466 U.S. 668 (1984) 3, 5, 9, 11, 12, 13

United States v. Day, 969 F.2d 39 (3d Cir. 1992) 6

United States v. Granados, 168 F.3d 343 (8th Cir. 1999) 4

United States v. Headley, 923 F.2d 1079 (3d Cir. 1991) 4

United States v. Kissick, 69 F.3d 1048 (10th Cir. 1995) 5, 8

United States v. Murray, 176 F.3d 476, 1999 WL 187192 (4th Cir. Apr. 6, 1999) 5

United States v. Palomba, 31 F.3d 1456 (9th Cir. 1994) 4

TABLE OF AUTHORITIES – Continued

Page

United States v. Soto, 132 F.3d 56 (D.C. Cir. 1997) ...4, 6

United States v. Thompson, 27 F.3d 671 (D.C. Cir. 1994) 4

CONSTITUTION, STATUTES AND RULES

U.S. Const., amend. V 3

U.S. Const., amend. VI 3

Fed. R. Crim. P. 32 9

Supreme Court Rule 37 1

MISCELLANEOUS

Mary Pat Flaherty & Joan Biskupic, *Despite Overhaul, Federal Sentencing Still Misfires*, Wash. Post, Oct. 6, 1996, at A21 5

Mary Pat Flaherty, *Innocent Errors Add Years to Terms of Guilty Parties*, Wash. Post, Oct. 6, 1996, at A21 6

Kate Stith & José A. Cabranes, *Fear of Judging* (1998) 6, 8

BRIEF OF AMICUS CURIAE FAMILIES AGAINST MANDATORY MINIMUMS FOUNDATION IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Families Against Mandatory Minimums Foundation (FAMM) files this amicus brief pursuant to this Court's Rule 37.2(a) in support of Paul Glover's petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit. Both petitioner and respondent have granted amicus FAMM consent to file this brief, and letters of consent have been filed with the Clerk of this Court.[1]

INTERESTS OF AMICUS CURIAE

FAMM is a nonprofit, nonpartisan organization that conducts research, promotes advocacy and educates the public regarding the excessive cost of mandatory minimum sentencing. This cost is not limited to public expenditures but includes the perpetuation of unwarranted sentencing disparities, disproportionate sentences, and the transfer of the sentencing function from the judiciary to the prosecution.

Founded in 1991, FAMM has 30 chapters and 18,000 members nationwide. FAMM conducts sentencing workshops for its members, publishes a newsletter, serves as a

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[1] In accordance with Supreme Court Rule 37.6, FAMM represents that no counsel for any party to this case authored this brief in whole or in part, and no person or entity, other than FAMM, made any monetary contribution to its preparation and submission.

sentencing clearinghouse for the media, and researches sentencing cases for pro bono litigation. FAMM does not argue that crime should go unpunished, but that the punishment should fit the crime. As an alternative to mandatory sentences, FAMM supports sentencing guidelines systems that are more sensitive to differences in culpability.

Therefore, FAMM has a special interest in ensuring that the U.S. Sentencing Guidelines function as they were designed – to reduce disparities – rather than create additional injustices through inconsistent application. Since 1995, FAMM has sponsored a Litigation Project. The Project's activities include providing input to the U.S. Sentencing Commission on Guidelines amendments and reform, screening cases and referring some to pro bono counsel, litigating cases in state and federal courts as *amicus curiae* and counsel of record, and providing pro bono consulting services to criminal defense counsel appearing before the U.S. Supreme Court. Directly relevant to the issue presented by this petition, over the past five years, the Litigation Project's staff has reviewed hundreds of letters, legal filings and court documents from defendants in federal criminal cases that involve Sentencing Guidelines issues. FAMM's legal staff has found numerous cases in which errors in guidelines calculations have resulted in higher sentences for defendants convicted of federal offenses. While not every case necessarily involved ineffective assistance of counsel, based upon our knowledge of the Guidelines and the cases we have reviewed, FAMM believes that attorney error in Guidelines sentencing is a recurring problem. Therefore,

as *amicus curiae*, FAMM urges the Court to address the important issue raised by this petition.

SUMMARY OF THE ARGUMENT

According to Seventh Circuit law, a defendant who receives additional time in prison as a direct result of representation that fell so far below professional norms so as to offend this Court's definition of the Sixth Amendment's guarantee of adequate representation, still has no recourse in the federal courts to correct his sentence. In fact, neither *Strickland v. Washington*, 466 U.S. 668, 690 (1984), nor any of this Court's ineffective assistance of counsel cases remotely suggests this abrogation of the guarantees in the Sixth Amendment's right to counsel and the Fifth Amendment Due Process Clause. Thus, it is not surprising that the Seventh Circuit's decisions on this issue conflict in some way with the various decisions of other circuits. Moreover, the Seventh Circuit's "significant prejudice" test ultimately allows the courts to ignore a serious issue in federal criminal practice: the difficulty of maintaining professional competence in the face of the complex and ever changing Sentencing Guidelines. The petition for certiorari should be granted to address this important policy issue.

REASONS FOR GRANTING THE WRIT

The questions presented are important to the administration of federal criminal justice, and the Seventh

Circuit's opinion is inconsistent with this Court's precedent and decisions of other circuits.

1. There exists a circuit conflict that is ripe for this Court's review.

The Seventh Circuit's rule that a six to twenty-one month increase in sentence fails to constitute "significant prejudice" represents the extreme end of a spectrum of conflicting circuit court opinions. The courts of appeals have generated a variety of distinct approaches to this issue, making it ripe for review by this Court.

For example, three circuits have granted § 2255 motions where the change due to counsel's error is two offense levels or less. *See United States v. Granados*, 168 F.3d 343 (8th Cir. 1999) (granting ineffective assistance of counsel motion for two-level error); *United States v. Thompson*, 27 F.3d 671 (D.C. Cir.), *cert. denied*, 513 U.S. 1050 (1994) (holding that one-level increase constituted prejudice); *United States v. Soto*, 132 F.3d 56, 59 (D.C. Cir. 1997) (similar); *United States v. Headley*, 923 F.2d 1079 (3d Cir. 1991) (similar). Two other circuits, the Second and the Ninth, have gone further, granting such motions where there was only a possibility of an enhanced sentence should petitioner be later arrested and sentenced under a repeat offender statute. *See Jackson v. Leonardo*, 162 F.3d 81 (2d Cir. 1998); *United States v. Palomba*, 31 F.3d 1456 (9th Cir. 1994). The Fourth, Fifth and Tenth Circuits have adopted a "significant prejudice" standard for ineffective assistance of counsel cases, but none of these courts have adopted the Seventh Circuit's explicit rule that a two-

offense-level change due to counsel's deficient performance is *per se* insufficient to constitute "prejudice" under *Strickland*. *See Spriggs v. Collins*, 993 F.2d 85, n.4 (5th Cir. 1993) (indicating *Strickland* prejudice would be found "when a deficiency by counsel resulted in a specific, demonstrable enhancement in sentencing."); *United States v. Murray*, 176 F.3d 476, 1999 WL 187192, *5 (4th Cir. Apr. 6, 1999) (per curiam) (*Strickland* prejudice found where counsel's deficient performance may have caused petitioner to be sentenced at level 39, rather than level 37); *United States v. Kissick*, 69 F.3d 1048 (10th Cir. 1995) (*Strickland* prejudice found where counsel's deficient performance may have caused petitioner to be assigned a criminal history category VI, rather than IV). Thus, the Court should grant certiorari to resolve these conflicting views among the courts of appeals on this issue.

2. The Seventh Circuit's "significant prejudice" test exacerbates a significant problem in the representation of federal criminal defendants.

The Seventh Circuit's rule camouflages rather than corrects serious issues concerning defense attorney competence under the Sentencing Guidelines. The Sentencing Guidelines were established to curtail widespread sentencing disparities. However, the Guidelines have grown more and more complex since they were first published in 1987; in fact, the amendments and commentary now take up more room than the sentencing rules themselves. Mary Pat Flaherty & Joan Biskupic, *Despite Overhaul, Federal Sentencing Still Misfires*, Wash. Post, Oct. 6, 1996, at A21. As a direct consequence, familiarity and competence with the Guidelines has become a significant part of

federal criminal practice. *See United States v. Soto*, 132 F.3d 56, 59 (D.C. Cir. 1997) ("Familiarity with the structure and basic content of the [Sentencing] Guidelines . . . has become a necessity for counsel who seek to give effective representation.") (quoting *United States v. Day*, 969 F.2d 39, 43 (3d Cir. 1992)). With hundreds of amendments and appellate court decisions interpreting the Guidelines, sentencing practice is now full of pitfalls for unwary practitioners. The sad reality is that some criminal defense attorneys have been unable to master the complexity of guidelines calculations and others have not kept up with the constantly changing guidelines landscape. *See* Kate Stith & José A. Cabranes, *Fear of Judging* 128 (1998) (citing studies that reflect "significant variation in Guidelines competence among defense attorneys."); Mary Pat Flaherty, *Innocent Errors Add Years to Terms of Guilty Parties*, Wash. Post, Oct. 6, 1996, at A21 (detailing mistakes in sentences that survived the scrutiny of attorneys, probation officers, and judges and quoting federal public defender who spent three and a half years checking defendants' sentences to conclude that math errors are made all the time). Quite clearly, sentencing is now an area in which there is a significant problem with attorney competence and preparation.

The Seventh Circuit's "significant prejudice" test sweeps cases like Mr. Glover's under the rug – leaving no forum where his unlawful sentence or counsel's errors can be addressed. Such a situation is not only unjust, it is also unhealthy for the criminal justice system. This is now apparent even to Seventh Circuit Judge Rovner, who joined the Seventh Circuit opinion that adopted the "substantial prejudice" test, but who now believes it should

be overturned. *Compare Durrive v. United States*, 4 F.3d 548 (7th Cir. 1993), *with Martin v. United States*, 109 F.3d 1177, 1178 (7th Cir. 1996) (Rovner, J., dissenting from denial of rehearing *en banc*). In addition to criticizing the doctrinal foundation of the "significant prejudice" test, Judge Rovner writes that "[w]hat the court has effectively done, it seems to me, is to lower dramatically the quality of advocacy vis a vis sentencing that will satisfy the Sixth Amendment. . . . [T]he defendant is entitled only to an attorney who does not overlook 'grave errors,' having a 'large effect' on the sentence." *Id.* at 1184-85. Thus, rather than encouraging defense counsel (and other sentencing participants, for that matter) to stay current on Guidelines issues and amendments, the Seventh Circuit rule reassures the weakest members of the federal criminal bar to rest assured that "minor" errors resulting from incompetence or laziness will not be reviewed. The Court should not endorse such a regime. So long as Congress leaves the Sentencing Guidelines in place, the Court should insist that the criminal defense bar be held to a standard that ensures defendants serve the time the law requires but not a day more.

Although the Sentencing Guidelines restrict judicial discretion, Congress – by providing for appellate review of guidelines sentences in the Sentencing Reform Act of 1984 – enlisted the appellate courts to ensure proper and uniform enforcement of the Guidelines. Contrary to this goal, a direct appeal may be meaningless where there is ineffective assistance of counsel at sentencing (especially when the defendant is represented by the same attorney at both proceedings). Errors in presentence investigation reports are often overlooked by judges, prosecutors, and

defense attorneys, many of whom see the probation officer as the expert. *See* Kate Stith & José A. Cabranes, *Fear of Judging* 129 (1998) (noting that many judges accord the probation officer's calculations presumptive weight). These errors remain uncorrected on direct appeal, due to the continued ineffectiveness of counsel or the lack of an adequate record. Thus, collateral review of attorney error is essential to effectuate the aims of the Sentencing Reform Act's review provisions.

In a number of ways, the Seventh Circuit's standard increases the sentencing disparities that the Guidelines were designed to eliminate. First, disparities between similarly situated defendants occur when an attorney fails to raise a meritorious issue. Second, the "significant prejudice" test creates a substantial likelihood of additional disparities between circuits, and even between panels within circuits. Because "significant prejudice" is not defined, either in absolute length or as a percentage of a sentence, individual panels and circuits are likely, and in fact have begun, to reach inconsistent results. *Compare Martin*, 109 F.3d 1177 (7th Cir. 1996), *with United States v. Kissick*, 69 F.3d 1048 (10th Cir. 1995), *cert. denied*, 117 S. Ct. 1008 (1997). As Judge Rovner remarked in her dissent in *Martin*,

> I cannot help but believe that in the adoption of this "significance" test, we have transformed ourselves into a kind of feudal duchy, with the power to grant or deny a reprieve to wrongfully sentenced prisoners according to our own whim. This is repugnant not only to our office as appellate judges but to the Guidelines themselves, which after all were adopted to achieve

> greater consistency in sentencing among similarly situated defendants.

109 F.3d at 1184.

3. Reversing the Seventh Circuit's "significant prejudice" test would not open the floodgates to a deluge of collateral sentencing litigation.

In *Durrive*, the case in which the Seventh Circuit created the significant prejudice test, the defendant argued that his offense level was two levels too high because the sentencing court failed to comply with Rule 32 of the Federal Rules of Criminal Procedure. Specifically, Durrive complained that the judge failed to ask whether he had personally read the presentence report, and he argued that if counsel had requested compliance with this Rule 32 requirement, the court would have found that the conspiracy contemplated a lesser quantity of cocaine (and hence applied an offense level of 26 rather than 28). However, this defendant never explained the link between the Rule 32 error and the quantity determination made by the court. Nor was it likely he could have done so. He admitted that he had read the presentence report with counsel and that counsel contested the conclusions of the report "at some length" during the sentencing hearing. Thus, the real problem with the defendant's argument in *Durrive* was not the degree of prejudice but the tenuous connection between counsel's error and the allegedly incorrect offense level. Applying the traditional *Strickland* test, the court simply could have held that the defendant failed to prove causation – that

but for counsel's error, the result would likely have been different.

In needlessly creating the "significant prejudice" test, the Seventh Circuit relied upon a fundamentally flawed description of Guidelines sentencing; that is, the *Durrive* court treats all sentencing decisions as if they are discretionary. Their reasoning is as follows: "Because the judge both determines a range and selects from within that range, almost any of counsel's actions has a potential effect on the sentence. Small failings by counsel are not enough to turn a probable acquittal into a probable conviction; equally slight failings could turn a 115 month sentence into a 120 month sentence." 4 F.3d at 550. Implicit in this analogy is an assumption that it is always impossible to determine how an error at sentencing impacts the ultimate sentence. This is simply not true for some types of attorney errors under the Sentencing Guidelines. While it may be difficult to identify the impact of attorney error on a judge's factual determinations or the sentence selected within a particular guidelines range, other sentencing choices have been constrained by the Commission and Congress to mechanical rules application, and hence objectively determinable ones. In some Guidelines cases, it is possible to determine very precisely the increase in offense levels or prison time caused by attorney incompetence.

The Seventh Circuit's incomplete sentencing model also explains how it was able to claim doctrinal support for its new rule. The *Durrive* court cites *Spriggs v. Collins*, 993 F.2d 85 (5th Cir. 1993) (*per curiam*), as the source of the "significant prejudice" test. However, *Spriggs* involved a

state penalty phase of a capital murder case in which the sentencing court enjoyed wide discretion to determine the sentence. In such cases, the *Spriggs* court correctly noted that it can be difficult to identify the impact of attorney error on the sentence selected. Therefore, it made sense to the Fifth Circuit to require a defendant to demonstrate that the error had a significant impact, not on the length of the sentence, *per se*, but on the court's exercise of its discretion in imposing that sentence. To take this reasoning and transpose it onto the Guidelines regime, where the precise impact can be measured, distorts the rule's original rationale. As Judge Rover noted in her dissent from the petition for rehearing *en banc* in *Martin*, "We have transformed *Spriggs* into an ostrich of a rule that deliberately blinds us even to an error that produces a quantifiable increase in a petitioner's sentence. Nothing in *Spriggs* supports that result." 109 F.3d at 1183.

At its heart, the Seventh Circuit's "significant prejudice" test is motivated by a fear of additional collateral review, not a principled argument based on *Spriggs* or this Court's decision in *Strickland* and its progeny. In *Durrive*, the court argued that unless a stricter standard is required for ineffective assistance of counsel claims at sentencing "almost any error at sentencing may be recast as a challenge to counsel." 4 F.3d at 550. Several years later in *Allen v. United States*, 175 F.3d 560, 563 (7th Cir. 1999), this court added, "We are reluctant to allow prisoners to circumvent the rule against raising Sentencing Guideline arguments in collateral proceedings by recasting their Guideline arguments as claims of ineffective assistance of counsel."

However, although there is a documented problem with sentencing practices under the Guidelines, this does not mean that overturning the "significant prejudice" test will result in a flood of collateral reversals of federal sentences. In reality, both the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) and the *Strickland* standard itself already impose substantial hurdles that only the clearest of cases, such as Glover's, can overcome. Recognizing that, in some cases, the Guidelines make it possible to measure the impact of attorney error at sentencing does not mean that all or even most guidelines calculations will be open to collateral attack. In petitioner Glover's case, the error was legal and could not be more clearly defined; either the convictions should be grouped or not. Therefore, the sentencing judge's decision was mechanical, not factual or discretionary at all. On the other hand, more cases are factually like those in *Durrive*, where the attorney error is both less clear and the impact of the error on the court's discretion harder to measure.

4. The Seventh Circuit's holding that an additional six to twenty-one months in prison is not "significant prejudice" is inimical to the rights guaranteed by the Fifth and Sixth Amendments.

The core of the Seventh Circuit's rationale for the significant prejudice test – that an increase in prison time of six to twenty-one months does not constitute sufficient "prejudice" under *Strickland* – conflicts with this Court's understanding of due process and the right to counsel. The Seventh Circuit purported to acknowledge that "any extra time in prison is significant from the defendant's perspective." *Martin v. United States*, 109 F.3d 1177, 1178

(7th Cir. 1997). Nevertheless, the Seventh Circuit claimed the power to adopt a rule of "proportionality" that allows it to deign what additional amount of prison time is significant enough to merit additional review by a federal court. *Id.* Apparently, the Seventh Circuit believes the costs to the court system in considering these cases are sufficient to counterbalance a particular defendant's loss of liberty. This assessment cannot be reconciled with the due process principle that loss of liberty is the most fundamental right protected by the constitutional provisions that regulate the criminal justice system. As this Court has stated, "[A]ny deprivation of liberty is a serious matter." *Argersinger v. Hamlin*, 407 U.S. 25, 41 (1972). *See also Scott v. Illinois*, 440 U.S. 367, 372-73 (1979); *County of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991) (requiring judicial determination of probable cause within 48 hours of arrest).

Nowhere in *Strickland's* discussion of the prejudice prong is there any suggestion that additional prison time does not qualify as prejudice. The Seventh Circuit can only make that claim by altering the *Strickland* test to require that the defendant show *"significant* prejudice." But as this Court has recognized, a single day in prison is quite significant to the defendant. *See Argersinger v. Hamlin*, 407 U.S. at 37 (1972) (" '[T]he prospect of imprisonment for however short a time will seldom be viewed by the accused as a 'trivial' or 'petty' matter and may well result in quite serious repercussions . . . ' ") (quoting *Baldwin v. New York*, 399 U.S. 66, 73 (1970)). The Seventh Circuit trivializes Mr. Glover's unlawfully lengthened prison term by reference to even greater sentencing injustices. Such a comparison is an affront to a fundamental

tenant of our criminal justice system – the principle of individualized justice. *See Stack v. Boyle*, 342 U.S. 1, 9 (1951) (Jackson, J., concurring) ("[E]ach defendant stands before the bar of justice as an individual.").

While those on the front lines of the criminal justice system may sometimes see themselves as performing triage surgery in an overburdened system, the fundamental principles of due process cannot allow the courts to create rules that disregard fundamental injustices just to keep the cases moving. A term of imprisonment carries with it various kinds of intentional and unintentional dehumanization and humiliation. It often includes the risk of inadequate medical care, assault and rape. These dangers are present each and every year, month, day and hour of prison time. Because the Seventh Circuit has condoned the continued incarceration of Mr. Glover for at least several months, despite its assumption that his sentence was the result of an error of constitutional magnitude, the "significant prejudice" test should be overruled.

CONCLUSION

For all of the foregoing reasons, FAMM, as *amicus curiae*, respectfully submits that the petition for writ of certiorari should be granted.

Respectfully submitted,

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(6)

Supreme Court, U.S.
FILED
AUG 28 2000
CLERK

No. 99-8576

IN THE

Supreme Court of the United States

PAUL L. GLOVER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED MARCH 6, 2000
CERTIORARI GRANTED JUNE 26, 2000

150 pp

TABLE OF CONTENTS

Description	Page
Docket Sheets from the United States District Court from the Northern District of Illinois, Civil Action No. 97-cv-8382	1
Docket Sheets from the United States Court of Appeals for the Seventh Circuit, Case No. 98-402 1	5
Section 2255 Motion to Correct Sentence, filed in U.S. District for the Northern District of Illinois, dated November 11, 1997	10
Memorandum Opinion and Order of U.S. District for the Northern District of Illinois, dated September 3, 1998	42
Brief and Appendix of Petitioner-Appellant Paul L. Glover of U.S. Court of Appeals for the Seventh Circuit, dated January, 1999 (Cover page and page eight included)	49
Order of U.S. Court of Appeals for the Seventh Circuit, dated July 15, 1999	52
Order of U.S. Court of Appeals for the Seventh Circuit, dated October 7, 1999	55
Presentence Investigation Report Prepared for U.S. District Court for the Northern District of Illinois (Cr. No. 95-CR-40), dated August 14, 1995	56
Statement of Correction to Presentence Investigation Report prepared for U.S. District Court for the Northern District of Illinois (CR. No. 95-CR-40), dated September 27, 1995	84
Transcript of Proceedings of the U.S. District Court for the Northern District of Illinois (Cr. No. 95-CR-40), dated September 21, 1995 (Pages one through four included)	87

TABLE OF CONTENTS—Continued

	Page
Judgment in a Criminal Case of U.S. District Court for the Northern District of Illinois (Cr. No. 95-CR-40), dated October 2, 1995	91
Brief of Defendant-Appellant Paul L. Glover to U.S. Court of Appeals for the Seventh Circuit (Case No. 95-3346), dated April 16, 1996	99
Opinion of U.S. Court of Appeals for the Seventh Circuit (Case No. 95-3346), dated December 2, 1996	129

Filed: 11/26/97

U.S. DISTRICT COURT

NORTHERN DISTRICT OF ILLINOIS (CHICAGO)

CIVIL DOCKET FOR CASE #: 97-CV-8382

UNITED STATES OF AMERICA,
Plaintiff,

v.

PAUL L.GLOVER,
Defendant.

DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
11/26/97	1	MOTION by defendant to vacate sentence (Attachments) Civil cover sheet (Documents 1-1 through 1-2) (Forwarded copy of motion to U. S. Attorney's Office). (jmp) [Entry date 12/09/97]
11/26/97	2	MOTION by defendant to file a brief in excess of 15 pages; (jmp) [Entry date 12/09/97]
12/4/97	3	MINUTE ORDER of 12/4/97 by Hon. William T. Hart Defendant/petitioner Paul Glover's motion for leave to file brief in excess of 15 pages granted [2-1]. Mailed notice (jmp) (Entry date 12/09/97]

DATE	NO.	PROCEEDINGS
6/15/98	4	MINUTE ORDER of 6/15/98 by Hon. William T. Hart: Government given until 7/6/98 to file answer brief to defendant/petitioner's motion to vacate sentence [1-1]. Defendant/petitioner's reply brief to be filed by 7/27/98. Ruling will be by mail. Mailed notice (vj) [Entry date 06/17/98]
7/6/98	5	MEMORANDUM by USA in opposition to petitioner's 28 U.S.C. Section 2255 motion to correct sentence [1-1] (Exhibits); Notice of filing (jmp) [Entry date 07/08/98]
7/27/98	6	REPLY by Paul L Glover to the Government's memorandum in oppostition to petitioner's 28 U.S.C. 2255 motion (Attachment) (jmp) [Entry date 07/28/98]
9/3/98	7	MEMORANDUM, OPINION, AND ORDER (jmp) [Entry date 09/08/98]
9/3/98	8	MINUTE ORDER of 9/3/98 by Hon. William T. Hart: Defendant's motion to vacate sentence is denied [1-1]. The Clerk of the Court is directed to enter judgment in favor of the government and against defendant denying the Section 2255 motion. If defendant wishes to appeal this order, he must file a Notice of Appeal to the U. S. Court of Appeals for the Seventh Circuit with the Clerk of the Court, U. S. Districct Court for the Northern District of Illinois, 219 S. Dearborn St., 20th Fl., Chicago, IL 60604, within sixty days of the entry of the judgment in this case. Any notice of appeal should be accompanied by a request for a

DATE	NO.	PROCEEDINGS
		certificate of appealability, including a statement as to why a certificate should issue. See 28 U.S.C. Section 2253; Fed. R. App. P. 22(b); 7th Cir. R. 22.1. Mailed notice (jmp) [Entry date 09/08/98]
9/3/98	9	ENTERED JUDGMENT (jmp) [Entry date 09/08/98]
10/19/98	10	NOTICE OF APPEAL by Paul L Glover from judgment entered [9-1], from motion minute order [8-1] and from order [7-1] (FEE NOT PAID) (pp) [Entry date 10/21/98]
10/19/98	11	REQUEST by Paul L Glover for certificate of appealability (pp) [Entry date 10/21/98]
10/19/98	12	STATEMENT by Paul L Glover in support of request for a certificate of appealability [11-1] (pp)[Entry date 10/21/98]
10/21/98	—	MAILED application to proceed without prepayment of fees and affidavit to Paul L Glover (pp) [Entry date 10/21/98]
10/21/98	—	FORWARDED LETTER to Judge Hart regarding certificate of appealability (pp) [Entry date 10/21/98]
10/21/98	—	TRANSMITTED to the 7th Circuit the short record on appeal. Mailed notice to all counsel. (pp) [Entry date 10/21/98]
10/22/98	13	MINUTE ORDER of 10/22/98 by Hon. William T. Hart Defendant's request for a certificate of appealability is granted [11-1]. The following substantial issue of constitutional law is certified for appeal:

DATE	NO.	PROCEEDINGS
		"Whether the potential effect on defendant's sentence of his attorneys' claimed deficient performance can satisfy the prejudice component of an ineffective assistance of counsel claim." Mailed notice (jmp) [Entry date 10/23/98]
11/6/98	14	APPLICATION by defendant to proceed without prepayment of fees and affidavit. (Attachments) (11) [Entry date 11/16/98]
11/24/98	—	TRANSMITTED to the 8th Circuit the long record on appeal consisting of one volume of pleadings with one loose pleadings transmitted under separate certificate. Mailed notice to all counsel. (pp) [Entry date 11/24/98]
12/1/98	15	ACKNOWLEDGEMENT of receipt of short record on appeal USCA 98-4021 (jmp) [Entry date 12/02/98]
12/1/98	16	CERTIFIED copy of Order from the 7th Circuit. (98-4021) It is ordered that all other proceedings in this appeal are suspended pending the decision by this court as to whether to issue a certificate of appealability. The court will take no further action in this appeal until the fee status is resolved (Attachment) (jmp) [Entry date 12/02/98] [Edit date 12/02/98]
12/4/98	17	MINUTE ORDER of 12/4/98 by Hon. William T. Hart Petitioner Paul L. Glover's application to proceed on appeal without prepayment of fees is granted [14-1]. Mailed notice (jmp) [Entry date 12/07/98]

DATE	NO.	PROCEEDINGS
12/4/98	18	MINUTE ORDER of 12/4/98 by Hon. William T. Hart Petitioner Paul L. Glover's application to proceed without prepayment of fees is granted [14-1]. Mailed notice (ar) [Entry date 12/11/98]
12/18/98	19	CERTIFIED copy of Order from the 7th Circuit. (98-4021) It is ordered that this appeal shall proceed to a determination of appellant's fee status on appeal. Briefing schedule in this appeal is suspended until further court order. (jmp) [Entry date 12/22/98]
7/16/99	20	COPY of Order submitted 06/23/99 — decided 07/15/99 from the 7th Circuit. The judgment of the district court if affirmed. (98-4021). (For further detail see order.) (hp) [Entry date 07/20/99]
10/12/99	21	COPY Order dated 10/12/99 from the 7th Circuit. Petitioner—appellant filed a petition for rehearing and petition for rehearing en banc. No judge in regular active service has requested a vote on the petition for rehearing en banc, and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore denied. (98-4021) (hp) [Entry date 10/14/99]

Filed: 11/24/98

UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT

98-4021

PAUL L. GLOVER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

DOCKET ENTRIES

DATE	PROCEEDINGS
11/24/98	Federal prisoner's 2255 case docketed. Certificate of Appealability granted 10/22/98. [98-4021] [1122496-1] Fee or IFP forms due on 12/8/98 for Paul L. Glover. Transcript information sheet due 12/4/98. (joce)
11/24/98	Original record on appeal filed. Contents of record: 1 vol. pleadings; 1 vol. loose pleadings. [98-4021] [1122506-1] (joce)
11/24/98	Filed Appellant Paul L. Glover docketing statement. [98-4021] [1122508-1] (joce)
12/1/98	The Antiterrorism and Effective Death Penalty Act requires approval from the Court of Appeals before a second or successive petition may be filed in the District Court. IT IS ORDERED that the

DATE	NO.	PROCEEDINGS
		appellee(s) file a statement advising this court whether the appellant(s) brought a previous petition challenging the same judgment that the appellant now challenges. (See order for further details) DW [98-4021] Statement due 12/14/98 for USA. (patb)
12/14/98		Filed Appellee USA jurisdictional memorandum.[98-4021] [1128272-1] (patb)
12/16/98		ORDER: This appeal shall proceed to a determination of appellant's fee status on appeal. [1122496-1] DW [98-4021] [1129065-1] Briefing is SUSPENDED pending further court order. (kell)
12/29/98		Filed District Court order GRANTING Paul L. Glover leave to proceed on appeal in forma pauperis. Date IFP granted: 12/04/98 [98-4021] [1122496-1] (terr)
12/29/98		ORDER: The District Court GRANTED the appellant leave to proceed on appeal in forma pauperis. Briefing will proceed as follows: [1122496-1] TEP [98-4021] 1. The appellant(s) brief is due on or before 1/28/99 for Paul L. Glover. 2. The appellee(s) brief is due on or before 3/1/99 for USA 3. The reply brief if any is due on 3/15/99 for Paul L. Glover (terr)
1/22/99		Filed 15c appellant's brief by Paul L. Glover. Disk not required. [98-4021] [1140781-1] (patb)
2/23/99		Filed 15c appellee's brief by USA. Disk filed. [98-4021] [1150677-1] (patb)

DATE	NO.	PROCEEDINGS
3/15/99		Filed 15c appellant's reply brief by Paul L. Glover. Disk not required. [98-4021] [1157735-1] (patb)
3/18/99		Possible successive appeal memorandum issued to Circuit Judge Richard D. Cudahy, Circuit Judge Michael S. Kanne, Circuit Judge Ilana D. Rovrier regarding previously considered appeal no(s). 95-3346. [98-4021] [1158516-1] (cint)
4/15/99		Circuit Judge Richard D. Cudahy, Circuit Judge Michael S. Kanne, Circuit Judge Ilana D. Rovner have determined this appeal not to be successive to 95-3346 and shall proceed accordingly. [98-4021] [1122496-1] (cint)
4/15/99		This cause has been determined to proceed without oral argument, pursuant to Circuit Rule 34(f). [98-4021] [1122496-1] (broo)
7/15/99		Filed Circuit Rule 53 order PER CURIAM. AFFIRMED. Circuit Judge Daniel A. Manion, Circuit Judge Michael S. Kanne, Circuit Judge Diane P. Wood. [98-4021] [1122496-1] (hard)
7/15/99		ORDER: Final judgment filed per C.R. 53 order. With costs: n. [98-4021] [1197672-1] (hard)
8/26/99		Filed 30c Petition for Rehearing with Suggestion for Rehearing Enbanc by Appellant Paul L. Glover. Dist. [98-4021] [1209925-1] (patb)

DATE	NO.	PROCEEDINGS
10/7/99		ORDER: Appellant Paul L. Glover Petition for Rehearing with Suggestion for Rehearing Enbanc is DENIED. [98-4021] [1209925-1] (land)
10/15/99		MANDATE ISSUED AND ENTIRE RECORD RETURNED. (Contents returned: .) [98-4021] [1122496-1] (cove)
12/21/99		Notice from the Supreme Court that a motion for extension of time to file a Petition for Writ of Certiorari has been GRANTED, extending such time to March 5, 2000. [1122496-1] [98-4021] (land)
3/16/00		Filed notice from the Supreme Court of the filing of a Petition for Writ of Certiorari. Supreme Court Case No.: 99-8576. [98-4021] [1271101-1] (land)
6/30/00		Filed order from the Supreme Court GRANTING the Petition for Writ of Certiorari. Supreme Court Case No.: 99-8576. [98-4021] [1303493-1] (joce)

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Docket No. 95CR40

Hon. Judge William J. Hart

UNITED STATES OF AMERICA,

Plaintiff/Respondent,

vs.

PAUL GLOVER,

Defendant/Petitioner.

Section 2255 Motion to Correct Sentence

and

Supporting Memorandum and Exhibits

PAUL L. GLOVER, PRO SE
06488-424
P.O. Box 1000
Marion, Illinois 62959

TABLE OF CONTENTS

Page

SECTION 2255 MOTION TO CORRECT SENTENCE 12

MEMORANDUM TO SUPPORT

I. Facts 19

II. Issues 22

III. Argument

A.) Petitioners' Offenses Should Have Placed in a Single Group 23

1.) The Grouping Requirement Section 3D1.2 23

2.) Section 3D1.2(a) 25

3.) Section 3D1.2(b) 25

4.) Section 3D1.2(c) 27

5.) Section 3Dl.2(d) 31

B.) Petitioners' Counsel Was Ineffective 34

C.) Petitioner Was Prejudiced by His Counsels' Ineffectiveness 39

IV. Conclusion 41

EXHIBITS

— Presentence Investigation Report

— Sentencing Transcript

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Case No. 95-CR-40-1
Paul L. Glover
Prisoner No. 06488-424

UNITED STATES OF AMERICA

v.

PAUL L. GLOVER

MOTION

1. Name and location of court which entered the judgment of conviction under attack—United States District Court-Northern District of Illinois-Eastern Division

2. Date of judgment of conviction—September 21. 1995

3. Length or sentence—84 months

4. Nature of offense involved (all counts)—Conspiracy to conduct racketeering: offer, accept, or solicitation to influence operations of employee benefit plan: money laundering; fraudulent income tax returns

5. What was your plea? (Check one)

(a) Not guilty ☒

(b) Guilty ☐

(C) Nolo contendere ☐

If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment give details:

N/A

6. If you pleaded not guilty, what kind of trial did you have? (Check one)

(a) Jury ☒

(b) Judge only ☐

7. Did you testify at the trial?

Yes ☐ No ☒

8. Did you appeal from the judgment of conviction?

Yes ☒ No ☐

9. If you did appeal answer the following:

(a) Name of court—U.S. Court of appeals for the Seventh Circuit

(b) Result—The decision of the District Court was affirmed

(c) Date of result—December 2, 1996

10. Other than a direct appeal from the judgment of conviction and sentence have you previously filed any petitions. applications or motions with respect to this judgment in any federal court?

Yes ☐ No ☒

11. If your answer to 10 was "yes." give the following information:

(a)(1) Name of court—N/A

(2) Nature of proceeding—N/A

(3) Grounds raised—N/A

(4) Did you receive art evidentiary hearing on your petition, application or motion?

Yes ☐ No ☐

(5) Result—N/A

(6) Date of result—N/A

(b) As to any second petition, application or motion give the same information:

(1) Name of court—N/A

(2) Nature of proceeding—*N/A*

(3) Grounds raised—N/A

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes ☐ No ☐

(5) Result—N/A

(6) Date of result—N/A

(c) Did you appeal, to an appellant federal court having jurisdiction, the result of action taken on any petition, application or motion?.

(1) First petition. etc. Yes ☐ No ☐

(2) Second petition. etc. Yes ☐ No ☐

(d) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not:

N/A

12. State *concisely* every ground on which you claim that you are being held in violation of the constitution, laws or treaties of the United States. Summarize briefly the facts supporting each ground. If necessary, you may attach pages stating additional grounds and facts supporting same.

CAUTION: If you fail to Set forth all ground in this motion, you may be barred from presenting additional grounds at later date.

For your information, the following is a list of the most frequently raised grounds for relief in these proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you have other than those listed. However, you should raise in this motion all available grounds (relating to this conviction) on which you based your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The motion will be returned to you if you merely check (a) through (j) or any one of the grounds.

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily or with understanding of the nature of the charge and the consequences of the plea.

(b) Conviction obtained by use of coerced confession.

(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.

(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.

(e) Conviction obtained by a violation of the privilege against self incrimination.

(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose in defendant evidence favoring to the defendant.

(g) Conviction obtained by a violation of the protection against double jeopardy.

(h) Conviction obtained by action of a grand or petit jurv which was unconstitutionally selected and impaneled.

(i) Denial of effective assistance of counsel.

(j) Denial of right of appeal.

A. Ground one: Denial of Effective Assistance of Counsel.

Supporting FACTS (state *briefly* without citing cases or law) Counsel failed to effectively represent me at sentencing and on appeal, when he failed to argue that the Sentencing Guidelines had been improperly applied. (See attached memorandum in support).

B. Ground Two: The Sentencing Guidelines were improperly applied when the Sentencing Court refused to group offenses.

Supporting FACTS (state *briefly* without citing cases or law): Section 3D1.2 provides for grouping of multi-count offense. The Sentencing Court refused to properly group my offenses, pursuant to Section 3D1.2(b), (c), and (d). (See attached memorandum in support).

C. Ground three:

Supporting FACTS (state *briefly* without citing cases or law):

D. Ground four:

Supporting FACTS (state *briefly* without citing cases or law):

13. If any of the grounds listed in 12A, B. C. and D were not previously presented, state briefly what grounds were not so presented, and give your reasons for not presenting them:

None of the grounds listed in 12 above were previously presented because of Ineffective Assistance of Counsel (See Attached Memorandum In Support).

14. Do you have any petition or appeal now pending in any court as to the judgment under attack?

Yes ☐ No ☒

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) A preliminary hearing George Murtaugh—100 West Monroe Street, Chicago, IL 60603: Thomas Breen—33 West Jackson Blvd, Chicago, IL 60604

(b) At arraignment and plea—Same as above

(c) At trial—Same as above

(d) At sentencing—Same as Above

(e) On appeal—Same as Above

(f) In any post-conviction proceeding—N/A

(g) On appeal from any adverse ruling in a post-conviction proceeding—N/A

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at approximately the same time?

Yes ☐ No ☐

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?

Yes ☐ No ☐

(a) If so, give name and location of court which imposed sentence to be served in the future:—N/A

(b) Give date and length of the above sentence:—N/A

(c) Have you filed, or do you contemplate filing, *any* petition attacking the judgment which imposed the sentence to be served in the future?

Yes ☐ No ☐

Wherefore, movant prays that the Court grant him all relief to which he may be entitled in this proceeding.

N/A
Signature of Attorney (if any)

I declare under penalty of perjury that the foregoing is true and correct. Executed on

_____
date

/s/ Paul L. Glover
PAUL L. GLOVER
Signature of Movant

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Docket No. 95 CR 40
Hon. Judge William J. Hart

UNITED STATES OF AMERICA,
Plaintiff/Respondent,

vs.

PAUL GLOVER,
Defendant/Petitioner.

Memorandum In Support of Section 2255 Motion To Correct Sentence

Now Comes Paul Glover. Hereafter "Petitioner", Pro Se, averring that the Sentencing Court misapplied the Sentencing Guidelines, when it failed to group all of the offenses. for which Petitioner was found guilty into a single group for sentencing purposes. In support of his 28 U.S.C. Section 2255 Motion to Correct his Sentence. Petitioner states as follows:

I. FACTS

A. *The Conviction*

Petitioner was convicted of multiple offenses arising from investments that he made on behalf of a Union's Pension and Health and Welfare Funds, and for which he, and others, obtained kickbacks. Specifically, Petitioner was found guilty of One Count of Conspiracy to Conduct Racketeering (18 U.S.C. 1962(d)), Eleven Counts of Soliciting and Receiving Kickbacks (18 U.S.C. 1954), Two counts of Money Laundering (18 U.S.C.1956) 1), and Four Counts of Income Tax Evasion (26 U.S.C.7206).

B. *The Presentence Investigation Report*

In preparation for Petitioner's Sentencing. the Probation Officer prepared a Presentence Investigation Report. In the Presentence Investigation Report. hereafter "the PSR". the Probation Officer states as follows:

1. "All of the conduct charged in Counts Two through Eighteen entails predicate acts of the Racketeering conspiracy charged in Count One" (PSR. Page 1).

2. "The Defendant and a Coconspirator. . . were involved in multiple criminal schemes throughout the time frame iterated above (March 1987 through January 1992), which primarily entailed the solicitation and acceptance of "Kickbacks" from various investments. utilizing union pension and health benefit funds. The Defendant... intended to take the proceeds of these illicit activities and convert them for personal use. To further perpetrate and avoid detection of these schemes. the Defendant laundered money and falsified his income tax returns." (PSR. Page 2).

3. ". . .The primary victims in this case were the (Union) members and beneficiaries of the pension and health and welfare funds who suffered the loss of actual funds. . . ." (PSR. Page 5).

4. The 1994 Edition of The Sentencing Guidelines Manual was used to compute the sentence. (PSR, Page 5).

5. The PSR grouped all the counts into a single count for sentencing purposes (PSR. Page 9-10).

C. *The Sentencing Hearing*

On 9/21/95 Petitioner was sentenced. Petitioner was represented by Attorney George Murtaugh, who, with Attorney Thomas Breen, represented Petitioner at trial.

The Government's position which had previously been submitted to the Court in a Position Paper concerning the grouping of the offenses was that the Money Laundering Offense should not be grouped with the other offenses because "there are separate victims with regard to the money laundering and the underlying offenses" (Sent. Trans. Page 4). The Government stated "the Seventh Circuit has not ruled on this issue." (Sent. Trans. Page 4).

The Court asked Attorney Murtaugh if he wanted to comment and he responded "No. your Honor. . . I think they are appropriately grouped." (Sent. Trans. Page 3-4). Petitioner's Attorney's offered no argument at sentencing against the Government's position or the Court's decision. Nor did Petitioner's Attorneys file a written Position Paper, in opposition to the Government's Position Paper, arguing that the offenses Petitioner was convicted of should constitute a single group.

The Court agreed with the Government's position, and grouped the Money Laundering separately from the other offenses (Sent. Trans. Page 4). Because there were now two groups of offenses Petitioner received a two level increase in his offense level (Sent. Trans. Page 15).

The Court then enhanced the Kickback Offense by two levels for Obstruction of Justice under Sec. 3 C1.1 of the Sentencing Guideline (Sent. Trans. Page 9).

Petitioner was sentenced to 84 months of incarceration (Sent. Trans. Page 24).

D. *The Appeal*

Petitioner appealed his sentence. The Attorneys for Petitioner in the Appeal were the same Attorneys that represented Petitioner at Trial and Sentencing.

The Issues presented on Appeal were:

1. Was the Petitioner denied a fair trial by the introduction of his incomplete testimony at a preceding trial? And

2. Did the District Court err by enhancing Petitioner's sentence for perjury at a prior trial of this case?

On December 2, 1996, the Appellate Court affirmed Petitioner's sentence (*U.S. v. Glover*, 101 F3d 1183. 1193 (7th Cir. 1996).)

II. ISSUES

Petitioner raises the following issues in his Sec. 2255 Motion:

A. Did the Sentencing Court misapply the Sentencing Guidelines. Sec. 3D1.2(b)-(d), when it revised the PSR by grouping the Money Laundering Offense separately from the other offenses?

B. Were Petitioner's Counsels ineffective at sentencing and on appeal. when they failed to argue that the grouping the Money Laundering Offense separately from the other offenses was a misapplication of Sec. 3D1.2(b)-(d)?

C. Was Petitioner significantly prejudiced by his Counsels's ineffective assistance. which resulted in his receiving a Two Level Increase in his Offense Level (an additional 15 months of incarceration) because of the inappropriate grouping of his offenses?

III. ARGUMENT

A. The Sentencing Court misapplied Sec. 3D.1.2 of the Sentencing Guidelines when it *Determined Not to Group the Money Laundering Offense with the Other Offenses.*

1. *Grouping Under The Sentencing Guidelines*

When a Defendant has been convicted of Multiple Counts the Sentencing Court shall group the counts pursuant to Sec. 3D1.2 (See Sec. 3D1.l). Section 3D1.2 provides that:

"All counts involving substantially the same harm shall be grouped together into a single Group. Counts involve substantially the same harm within the meaning of this rule:

(a) When counts involve the same victim and the same act or transaction.

(b) When counts involve the same victim and two or more acts or transactions connected by a common criminal objective or constituting part of a common scheme or plan.

(c) When one of the counts embodies conduct that is treated as a specific offense characteristic in, or other adjustment to. the guideline applicable to another of the counts.

(d) When the offense level is determined largely on the basis of the total amount of harm or loss, the quantity of a substance involved. or some other measure of aggregate harm. or if the offense behavior is ongoing or continuous in nature and the offense guideline is written to cover such behavior.

Offenses covered by the following guidelines are to be grouped under this subsection:

§§ 2B1.1, 2B1.3, 2B4.1, 2B5.1, 2B5.3, 2B6.1;
§§ 2C1.1, 2C1.2, 2C1.7;
§§ 2D1.1, 2D1.2, 2D1.5, 2D1.11, 2D1.13;
§§ 2E4.1, 2E5.1;
§§ 2F1.1, 2F1.2;
§ 2K2.1;
§§ 2L1.1, 2L2.1;
§ 2N3.1;
§ 2Q2.1;
§ 2R1.1;
§§ 2S1.1, 2S1.2, 2S1.3;
§§ 2T1.1, 2T1.4, 2T1.6, 2T1.7, 2T1.9, 2T2.1, 2T3.1....

Exclusion of an offense from grouping under this subsection does not necessarily preclude grouping under another subsection."

The Commentary to Sec. 3D 1.2 in the Sentencing Guidelines provides the following explanations:

"Application Notes:

1. Subsections (a)-(d) set forth circumstances in which counts are to be grouped together into a single Group. Counts are to be grouped together into a single Group if any one or more of the subsections provide for such grouping...

2. The term "victim" is not intended to include indirect or secondary victims. Generally, there will be one person who is directly and most seriously affected by the offense and is therefore identifiable as the victim. For offenses in which there are no identifiable victims... the "victim" for purposes of subsections (a) and (b) is the societal interest that is harmed. In such

cases. the counts are grouped together when the societal interests that are harmed are closely related... Ambiguities should be resolved in accordance with the purpose of this section as stated in the lead paragraph. i.e., to identify and group "counts involving substantially the same harm."

2. Under Sec.3D 1.2(a) Petitioner's Money Laundering Offense Was Properly Not Grouped With the Other Offenses.

Since Petitioner's offenses involved "two or more acts", it was a correct application of the Sentencing Guidelines not to group under Sec. 3D 1.2(a). However, even though Sec. 3D1.2(a) does not provide for grouping of Petitioner's offenses, it does not mean they can not be grouped under Sec.3D1.2(b),(c), or (d).

3. Under Sec.3D1.2(b) Petitioner's Money Laundering Offense Must Be Grouped With The Other Offenses.

Sec.3D1.2(b) requires grouping if the offenses "involve the same victim" and the criminal acts are "connected by a common criminal objective or constituting part of a common scheme or plan".

A Common Scheme/Plan is defined in the Commentary to Sec. 3D1.2(b) Application Note 9:

"(A) *Common scheme or plan*. For two or more offenses to constitute part of a common scheme or plan, they must be substantially connected to each other by at least one common factor, such as common victims, *common accomplices*, *common purpose*, or similar *modus operandi*. "(emphasis added)

And as noted in the Introductory Comments to Part D: Third Paragraph: "Some offense that may be

charged in multiple-count indictments are so closely intertwined with other offenses that conviction for them ordinarily would not warrant increasing the guideline range." Even if they constitute legally distinct offenses occurring at different times (Commentary, Application Note 4).

a. *The Money Laundering Offense And The Other Offenses Are Intertwined, Constitute a Common Scheme, and Have the Same Victim*

As set forth in the PSR. Page 2. "To further perpetrate and avoid detection of these schemes. the Defendant laundered money and falsified his income tax returns." Clearly, the Money Laundering Offense is so closely intertwined with the other offenses that they must be grouped together in one count.

Furthermore, the Money Laundering Offense and the other offenses "constitute a common scheme or plan" since they share a common victim (the benefit funds and their beneficiaries). common accomplices (Petitioner and Johnson) and common purpose (to get proceeds from the illicit activities and convert them for personal use, while avoiding detection) (See: *U.S. v. Bruder*, 945 F.2d 167. 170 (7th Cir. 1991), where the Court found that closely intertwined offenses should be grouped: *U.S. v. Bradach*, 949 F. 2d 1461. 1464 (7th Cir. 1991). where the Court grouped offenses under Sec. 3D 1.2(b), even though the harm was not the same, but the offenses involved the same victims and were part of a common scheme; *U.S. v. Griffth*, 85 F. 3d 284, 288 (7th Cir. 1996), where the Court grouped a RICO Conviction and a Money Laundering conviction because the offenses involved "substantially the same harm").

A case very similiar to Petitoner's case is *U.S. v. Cusumano*, 943 F. 2d 305 (3rd Cir. 1991). In *Cusumano* the Defendant was the administrator of a Union Health and Welfare Fund. He received kickbacks from service providers, in violation of 18 U.S.C. 1954. and then illegally laundering the kickbacks in violation of 18 U.S.C. 1956. The Court, citing § 3DI.2(b), found that the kickback offense and money laundering offense were properly grouped since "the victim of all offenses in this case was the Fund and its beneficiaries. The evidence demonstrated that the unlawful kickbacks . . . and the money laundering were all part of one overall scheme to obtain money from the fund and to convert it to the use of (Defendants)." (at 313).

The Seventh Circuit in *U.S. v. Wilson*, 98 F.3d 281 (7th Cir. 1996). following *Cusumano*, found that Money Laundering and Mail Fraud should be properly grouped since they constitute "closely related counts" under § 3D1.2 (at 283-284).

b. Conclusion

Based on the intent of Sec. 3D 1.2(b), and applicable case law, the Money Laundering Offense must be grouped with the other offenses, since they harm the same victim, are intertwined, and constitutes the same common scheme.

4. Under Sec. 3D1.2(c) Petitioner's Money Laundering Offense Must Be Grouped With the Other Offenses

Sec. 3D 1.2(c) requires Grouping "When one of the counts embodies conduct that is treated as a Specific Offense Characteristic In, or other adjustment to, the Guideline applicable to another of the counts."

Subsection (c) is explained in the Commentary to Sec. 3D1.2, Application Note 5:

> "Subsection (c) provides that when conduct that represents a separate count, *e.g.*, bodily injury or obstruction of justice, is also a specific offense characteristic in or other adjustment to another count, the count represented by that conduct is to be grouped with the count to which it constitutes an aggravating factor. This provision prevents "double counting" of offense behavior. Of course, this rule applies only if the offenses are closely related. . . However, a count such as obstruction of justice, which represents a Chapter Three adjustment and involves a different harm or societal interest than the underlying offense, is covered by subsection (c) even though it is not covered by subsection (a)."

In Petitioner's PSR the Kickback Offense Base Offense Level was increased by two levels under Specific Offense Characteristics because "Defendant was the fiduciary of the benefit plan or labor organization" (PSR. Page 6), and another two levels under Adjustment of Obstruction of Justice under Sec. 3C1.l (Statement of Correction. Page 1). The Money Laundering Offense Base Offense Level was increased by two levels under Adjustments for Role in the Offense because "Defendant abused a position of trust... Defendant's fiduciary position within (the union). that enabled the Defendant to perpetrate this offense...", and another two levels under Adjustment for Obstruction of Justice under Sec.3C1.l (PSR. Page 7).

a. The Money Laundering Offense and the Other Offenses Share Specific Offense Characteristics and Adjustments, that Require Grouping.

The Money Laundering Offense embodies elements of Obstruction of Justice (*U.S. v. Maggi*, 44 F.3d 478, 481 (7th Cir. 1995)), therefore when the Court enhanced the other offenses by two levels for obstruction of justice it was required that the offenses be grouped together (see: *U.S. v. Connor*, 950 F. 2d 1267. 1276 (7th Cir. 1991)), where the Court stated in footnote 5. "If the Court adds two points for obstruction of justice (under 3C 1.1), the grouping of the offenses will change. "When one of the counts embodies conduct that is treated as a specific offense characteristic in, or other adjustment to, the Guideline applicable to another of the counts "the counts should be grouped together. U.S.S.G § 3D1.2(1990). The Commentary says that this rule applies to obstruction of justice adjustments. U.S.S.G §3D1.2. Comment, (n.5). and 3C1.1. Comment, (n.6), (citing *U.S. v. Hankins*, 931 F. 2d 1256. 1264 (8th Cir. 1991))"

This argument could be made only after the Sentencing Court had 1) decided not to group money laundering and the other offenses, and had 2) enhanced Petitioner, under Sec.3C1.l. under the other offenses. However, after the enhancement under Sec.3C 1.1 the issue of Grouping was not revisited.

Furthermore, under the Kickback Offense Petitioner was given a two level enhancement under Specific Offense Characteristics for being a fiduciary of the benefit plan or labor organization, and in the money laundering Petitioner was given a 2 level enhancement under adjustments for role in the offense, for abuse of a position of trust as a fiduciary of a labor organization. Thus,

the same type of conduct—violation of fiduciary obligations—resulted in petitioner being enhanced under both kickback and money laundering offenses ("Double Counting"). These enhancements connect the two offenses and require that they be grouped together under § 3D1.2(c) (See: *U.S. v. Haltom*, 113 F.3d 43.46 (5th Cir. 1997)), where (Defendant) contends that the conduct underlying his mail fraud conviction resulted in an enhanced offense level for tax evasion, and that therefore the counts should have been grouped. . . (Defendant's) offense level for tax evasion was increased by two because of his unreported income was derived from criminal activity, *i.e.*, the mail fraud alleged in count one. It is therefore indisputable that the mail fraud count "embodies conduct that is treated as a specific offense characteristic "of the tax evasion counts. . . (Defendant's) mail fraud and tax evasion convictions can not readily be said to have caused "substantially the same harm" (mail fraud-damage to private individuals: tax offense-harm to government). "Absent a contrary directive in the guidelines themselves, we might have considered these harms quite distinct and concluded (Defendant's) offenses were not groupable. However, we are bound by the text of the applicable guideline (§ 3D1.2(c)). This definition removes any doubt (Defendant's) offenses must be grouped.")

b. *Conclusion*

Pursuant to the intent of (§ 3D1.2(c)), and applicable case law, the Money Laundering Offense must be grouped with the other offenses, since the Obstruction of Justice enhancement, and the "Double Counting" caused by the same type of

conduct in the Money Laundering Offense and the other Offenses, dictates a single grouping of offenses.

5. Under Sec. 3D1.2(d) Petitioner's Money Laundering Offense Must Be Grouped With The Other Offenses.

Sec.3D1.2(d) requires Grouping "when the offense level is determined largely on the basis of the total amount of harm or loss. . . or some other measure of aggregate harm. or if the offense behavior is ongoing. . . and the offense guideline is written to cover such behavior." The offenses specifically included for grouping under § 3Dl.2(d) are then listed. (See Section III. A. 1. Above).

Subsection (d) is explained in the Commentary to Sec. 3D12. Application Note 6:

"Subsection (d) likely will be used with the greatest frequency. It proves that most property crimes and other crimes where the guidelines are based primarily on quantity . . . are to be grouped together. The list of instances in which this subsection should be applied is not exhaustive. Note, however, that certain guidelines are specifically excluded from the operation of subsection(d)."

A conspiracy, attempt, or solicitation to commit an offense is covered under subsection (d) if the offense that is the object of the conspiracy, attempt, or solicitations covered under subsection (d).

Counts involving offenses to which different offense guidelines apply are grouped together under subsection (d) if the offenses are of the same general type and otherwise meet the

criteria for grouping under this subsection. The same general type "of offense is to be construed broadly, and would include, for example larceny, embezzlement, forger, and fraud.

a. All of Petitioner's Offenses Are Specifically Included for Grouping Under Sec. 3DL2(d)

1. Petitioner's kickback offense, under 18 U.S.C. 1954, is calculated on Page 6 of his PSR. The Racketeering Conspiracy Offense, under 18 U.S.C. 1962, is determined by the predicate acts—the kickbacks. The determination as to the adjusted Offense Level is accomplished under U.S.S.G. 2E5.1, using 2F1.1 Tables, which, based on the aggregated amount of the total commissions paid, (more than 1.5, but less than 2.5 million) increased Petitioner's Offense Level by 12. Both 2E5.1 and 2F1.1 are listed offenses that are to be grouped under Sec. 3D 1.2(d).

2. Petitioner's Money Laundering Offense, Level (PSR Page 7), is determined under U.S.S.G. 2S1.1. Section 2S1.1 is a listed offense, that is to be grouped under § 3D1.2(d).

3. Petitioner's fraudulent income tax return offense level (PSR Page 9) is determined under U.S.S.G. 2T1.1 and 2T4.1. Sections 2T1.1 and 2T4.1 are listed offenses that are to be grouped under §3D1.2(d).

4. Therefore, all of the offenses, which determined the offense level for Petitioner's sentencing, are specifically included

for grouping purposes under § 3D1.2(d) and should be grouped together. *U.S. v. Bruder*, 945 F.2d 167, 170 (7th Cir. 1991) (In accord: *U.S. v. Tai*, 994 F. 2d 1204, 1213 (7th Cir. 1993). where the Court discussed § 3D1.2(d), noting "mercifully, the guideline lists the specific offenses to which it does not apply."; *U.S. v. Sykes*, 7 F. 3d 1331. 1336 (7th Cir. 1993); *U.S. v. Morgano*, 39 F. 3d 1358. 1379 (7th Cir. 1994); *U.S. v. Brown*, 31 F. 3d 484. 494 (7th Cir. 1994), where, in footnote 15, the Court found ". . . the district court correctly grouped the conviction counts (fraud and money laundering) together. . . See U.S.S.G. Sec. 3D 1.2(d), 2S1.1(c).").

b. All of the Petitioner's Offenses Are of the Same General Type, as Required By Sec. 3D1.2 (d) for Grouping

As set forth in the Commentary. Application Note 6 "The 'same general type' of offense is to be construed broadly" for grouping under Sec.3D1.2(d). Money Laundering and the other offenses are of the "same general type" to be grouped together under Sec.3D1.2(d). (See: *U.S. v. Brown*, supra.; *U.S. v. Adams*, 74 F.3d 1093. 1102 (11th Cir. 1996), where the Court found in Footnote 12. "Fraud and Money Laundering convictions, however, can be grouped under U.S.S.G. §3D1.2(d). *U.S. v. Mullens*, 65 F.3d 1560 (11th Cir. 1995)").

In *U.S. v. Wilson*, 98 F.3d 281, 283 (7th Cir. 1996). the Court grouped Mail Fraud (2F1.1) and Money Laundering (2S1.1) under Sec.

3D1.2(d), because the offenses were listed under Sec. 3D1.2(d) and satisfied the standard set forth in Application Note 6. The Court stated: "Broadly speaking, they are 'of the same general type,' and the offense level for each 'is determined largely on the basis of the total amount of harm or loss' as subsection (d) envisions. . . we reject the government's contention that these offenses are inappropriate for grouping because they involved different victims and thus different harms." *Footnote 3*. Note 6 explains that "[T]he 'same general type' of offense is to be construed broadly, and would include, for example, larceny, embezzlement, forgery, and fraud."(at 283).

c. *Conclusion*

Based on the intent of Sec. 3D1.2(d), and applicable case law, the Money Laundering Offense must be grouped with the other offenses, since they are specifically included for grouping. and are of the same general type.

B. *Petitioner's Counsel was Ineffective at Petitioner's Sentencing and On Appeal*

1. *The Standard For Determining That Counsel Was Ineffective*

The Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052. 80 L.Ed.2d 674(1984), established the standard by which the performance of Counsel will be judged to determine if Counsel was ineffective in representing a Defendant.

The Seventh Circuit has analyzed the *Strickland* Standard as follows:

> A defendant ". . . must show (1) that the attorney's representation fell below an objective standard of reasonableness (performance prong), *Strickland v. Washington*, 466 U.S. 668. 688. 104 S. Ct. 2052, 2005, 80 L.Ed. 2d 674 (1984), and (2) that there exists a reasonable probability that, but for counsel's unprofessional errors. the result of the proceedings would have been different (prejudice prong). id. At 694. 104 S. Ct. At 2068. See also *U.S. ex Rel. Barnard v. Lane*. 819 F. 2d 798. 802 (7th Cir. 1987); *U.S. v. Hiflsberg*. 812 F.2d 328. 336 (7th Cir.). cert denied. 481 U.S. 1041. 107 S. Ct. 1980. 95 L. Ed. 2d 821 (1987)). With regard to the performance prong, the defendant must identify the specific acts or omissions of counsel that formed the basis for this claim of ineffective assistance. *Strickland*. 466 U.S. at 690, 104 S. Ct. at 2066. The Court 'must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance.' I . . . as to the prejudice prong of the inquiry a 'reasonable probability' of a different result means a 'probability sufficient to undermine confidence in the outcome [of the trial].' *Strickland*. 466 U.S. at 694, 104 S. Ct. at 2068." (*U.S. v. Delgado*, 936 F.2d 303, 310 (7th Cir. 1991); *Patel v. U.S.*, 19 F. 3d 1231, 1235 (7th Cir. 1994)).

2. The Strickland Standard Applies To Sentencing

The Seventh Circuit has ruled that the *Strickland* Standard, requires the defendant's counsel to render effective representation, at the sentencing phase of the trial. (See:

U.S. V. Delgado. 936 F. 2d 303. 310 (7th Cir. 1991), citing *U.S. v. Slaughter*. 900 F. 2d 1119. 1124-25 (7th Cir. 1990); *Ebbole v. U.S.* 8 F.3d 530. 533 (7th Cir. 1993)).

3. The Issue of Ineffective Counsel is Properly Raised in a Section 2255 Motion

As decided in *Guinan v. U.S.*. 6 F.3d 468 (7th Cir. 1993), the issue of ineffective assistance is properly raised at the collateral stage (i.e. a Section 2255 Motion). rather than on direct appeal, if defendant has a valid reason for postponing the raising of the ineffective assistance claim (Id. at 472). And "If (Defendant) was represented on appeal by the very lawyer who he now claims did not represent him effectively at trial, then he could not, as a practical matter, have raised the ineffective assistance claim on direct appeal, so there is no forfeiture." (Id. at 471. citing *Velarde v. U.S.* 972 F.2d 826. 827 (7th Cir. 1992): also: *Degaglia v. U.S.*, 7 F. 3d 609. 611 (7th Cir. 1993); *Amhrizv. U.S.* 14 F. 3d 331, 333 (7th Cir. 1994)).

Accordingly, since Petitioner was represented by the same attorneys at trial, sentencing, and direct appeal, he may raise the issue of ineffective assistance of counsel in this Section 2255 Motion.

4. The Specific Omission of Petitioner's Counsels' that Establish Counsels Ineffectiveness

As set forth in B.1. above, Petitioner "must identify the specific acts or omissions of counsel" that form the basis for his claim of ineffective assistance (*U.S. v. Delgado*, 936 F. 2d 303, 310 (7th Cir. 1991); *U.S. v. Johnson-Wilder*. 29 F. 3d. 1100, 1104 (7th Cir. 1994); *Velarde v. U.S.* 972 F.2d 826, 829 (7th Cir. 1992)).

Accordingly, Petitioner sets forth the following specific omissions by his trial counsels, at sentencing, that form the basis of his claim of ineffective assistance of counsel:

c) Prior to the sentencing hearing, Petitioner's Counsels received the Governments position paper in opposite to sentencing in the PSR. The grouping of the multiple counts into a single group for sentencing purposes was one of the three areas opposed by the Government in its position paper.

Petitioner's Counsels did not prepare any written response to the Government's position paper in opposition to the PSR. As set forth in III.A. above, such a presentation of evidence would have been persuasive, and therefore, Petitioner's Counsels were ineffective for not having prepared, and presented to the Sentencing Court, a written response to the Government's position paper, setting forth the arguments that the PSR was correct in grouping all the counts into one group for sentencing purposes under Section 3D of the Sentencing Guidelines. And pointing out the Seventh Circuit cases which supported grouping (See III.A. above), that the Government stated did not exist. (See : *U.S. exRel. Cross v. DeRobertis*. 811 F. 2d 1008. 1015 (7th Cir. 1987).

d) Only one of Petitioner's Counsels participated in the sentencing proceeding. Attorney Breen did not arrive in Court until after the sentencing Court had determined the outcome of the grouping issue. Therefore, Petitioner was deprived of Attorney's Breen's representation at sentencing by his absence.

e) Attorney Murtaugh was present for the entire sentencing proceeding. His failure to effectively

represent Petitioner, when the issue of grouping was presented to the sentencing court by the Government is apparent from the transcript of the sentencing hearing: when the Sentencing Court asked Attorney Murtaugh if he wanted to comment on the grouping issue, he merely responded "No . . . I think they are appropriately grouped." (Sent. Trans. Page 3-4). Attorney Murtaugh made no attempt to present any argument in opposition to the arguments presented by the Government concerning the grouping of the counts in the PSR. He presented no case law in opposition to the Government's position. even though, as set forth in III.A. above, such case law in support of the grouping as set forth in the PSR existed and was persuasive. Attorney Murtaugh's failure to represent Petitioner effectively at the sentencing Petitioner to receive a two level enhancement. The Guidelines and relevant case law make it clear that such an enhancement is not permitted. (See: *Barker v. U.S.*. 7 F.3d 629, 635) 7th Cir. 1993): *U.S. v. Baldwin*, 1956 F. 2d 643. 645-646) 7th Cir. 1992); *U.S. v. Ford*. 918 F. 2d 1343. 1350(8th Cir. 1990)).

f) Petitioner's Counsels did not raise the issue of the grouping in Petitioner's Appeal to the Seventh Circuit Court of Appeals. Raising this issue on appeal and arguing that the counts were not properly grouped, would have resulted in the two level enhancement Petitioner received being overturned by the Appellate Court. Petitioner's Counsels failure to directly appeal the Sentencing Court's improper enhancement of Petitioner's sentence constitutes ineffective assistance of counsel. (See: *Hollenback v. U.S.*, 987 F. 2d 1272. 1275) 7th Cir. 1993).

5. Conclusion

It is apparent from the Sentencing transcript, and the fact that no written response to the Government's position paper, was submitted, that Petitioner's Counsels had not prepared to represent Petitioner at his sentencing. In *U.S. v. Jackson*, 935 F.2d 832. 845 (7th Cir.1991), the Court stated that "[e]ffective representation of a criminal Defendant requires pretrial preparation and investigation." The same "preparation" is required at a defendant's sentencing, otherwise a defendant may be subject to inappropriate enhancements. Attorneys are expected to be familiar with the Sentencing Guidelines and know whether the sentence being administered under those Guidelines is correct. (See: *U.S. v. Day*, 969 F. 2d 39. 43)(3rd Cir. 1992)).

Petitioner's Counsels were clearly not familiar with Section 3D of the Guidelines. They had not adequately investigated those guidelines, nor had they adequately prepared to argue that the PSR's position on grouping the charges was correct, and that the Government's position, that the convictions should be separately grouped, was incorrect. Thus, Petitioner was without effective representation at sentencing. When Petitioner's Counsels failed to appeal his two level grouping enhancement they failed to effectively represent him on appeal.

C. Petitioner Was Prejudiced By His Counsels' Ineffectiveness

1. The Standard For Determining That Petitioner was Prejudiced By The Ineffectiveness Of Counsel

As set forth in B.l., above, pursuant to *Strickland v. Washington*, supra, for a defendant to prevail on

an ineffective counsel claim he must show counsel's performance was deficient *and* he was prejudiced thereby. Prejudice is defined as a reasonable probability that, but for counsel's unprofessional errors the result of the proceedings would have been different.(*Strickland* at 2068). (See: *U.S. v. Johnson-Wilder*, 27 F.3d. 1100. 1104(7th Cir. 1994).

2. The Prejudice

It is clear that Petitioner was prejudiced by his Counsels ineffectiveness at the sentencing hearing and on appeal. Petitioner's Counsels' failure to show the Sentencing Court that the grouping of the charges, as set forth in the PSR, was the correct application of the guidelines, and, correspondingly, that the Government's position was incorrect, caused the Sentencing Court to enhance Petitioner's sentence two levels–from offense level 26 to offense level 28. This two level enhancement resulted in Petitioner being given an additional fifteen months of incarceration.

As is set forth in III.A. above, the two point enhancement was an inappropriate application of the Sentencing Guidelines. Therefore, Petitioner was prejudiced, when, due to his Counsels' ineffectiveness at sentencing he was inappropriately sentenced to an additional fifteen months of incarceration.

If Petitioner's Counsels had appealed this improper application of the Sentencing Guidelines, the Appellate Court would have overturned the two point enhancement, thereby reducing Petitioner's sentence by fifteen months.

Since this fifteen month represents a significant increase in Petitioner's sentence (12%) Petitioner has established the prerequisite prejudice necessary to meet the second prong of the *Strickland* Test (*Durrive v. U.S.*, 4 F.3d 548. 551 (7th Cir 1993).

IV. CONCLUSION

Based on the above recitation of facts and law, Petitioner's Section 2255 Motion should be granted. Thereafter, Petitioner should be properly sentenced under Part 3D of the Sentencing Guidelines, with all counts being grouped in a single count, and Petitioner's offense level established at 26.

Respectfully submitted.

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IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 97 C 8382
No. (95 CR 40)

UNITED STATES OF AMERICA,

Plaintiff,

v.

PAUL L. GLOVER,

Defendant,

MEMORANDUM OPINION AND ORDER

Following a jury trial, defendant Paul Glover was found guilty of one count of a conspiracy in violation of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962(d); 11 counts of soliciting and receiving kickbacks in violation of 18 U.S.C. § 1954; two counts of money laundering in violation of 18 U.S.C. § 1956(a) (1) (B) (i); and four counts of tax evasion in violation of 26 U.S.C. § 7206. He was sentenced to concurrent terms of incarceration with the longest term being 84 months. The term of incarceration is to be followed by three years' supervised release. Additionally, Glover was required to forfeit $325,000. Glover's conviction and sentence were affirmed on direct appeal, where he was represented by the same counsel who represented him at trial. *See United States v. Glover*, 101 F.3d 1183 (7th Cir. 1996). Less than one year after the decision on appeal became final, Glover filed his present motion pursuant to 28 U.S.C. § 2255.

Glover presently contends that his guideline sentencing range was incorrectly calculated in that his money laundering offenses should have been grouped with his conspiracy and kickback offenses. See U.S.S.G. § 3D1.2. He further contends that his counsel were ineffective for failing to adequately raise this issue at the time of sentencing and for failing to raise the issue at all on direct appeal. At the time of sentencing, it was determined that Glover's total offense level was 28 and his criminal history category was I for a guideline range of 78 to 97 months. He was sentenced to 84 months' incarceration. Had the money laundering been grouped with the conspiracy and kickback offenses, the total offense level would have been 26 and the guideline range would have been 63 to 78 months.[1] Glover's sentence would have had to have been reduced by at least 6 months and possibly up to 21 months, though it is unlikely that he would have been sentenced to the low end of the 63-78 month range since he was not sentenced on the low end of the 78-97 month range.[2]

At the time plaintiff was sentenced, the Seventh Circuit had not yet considered the particular grouping issue that Glover

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[1] The government contends that reducing the newly grouped offense level to 26 would require that an additional level be added based on the separately grouped tax offenses being within 8 points of the 26 offense level. See U.S.S.G. § 3D1.4(b). However, the tax offenses had an offense level of 16, not the 18 referred to in the government's brief. Perhaps the government was adding two points for obstruction of justice, but the probation officer did not recommend such an adjustment for the tax offenses and no finding to that effect was made. Since the tax offenses would be 10 levels lower than the other group, no adjustment would be made. *See id* § 3D1.4(c)

[2] The tax offenses could have been a basis for not sentencing on the low end See U.S.S.G. § 3D1.4(c).

now attempts to raise. Other circuits had held that separate grouping was required. *See, e.g., United States v. Lombardi*, 5 F.3d 568, 570-71 (1st Cir. 1993) (grouping money laundering separate from conspiracy/mail fraud); *United States v. Taylor*, 984 F.2d 298, 303 (9th Cir. 1993) (grouping money laundering separate from wire fraud); *United States v. Smith*, 13 F.3d 1421, 1428 (10th Cir.), *cert. denied*, 513 U.S. 878 (1994) (grouping money laundering separate from mail fraud). In *United States v. Wilson*, 98 F.3d 281, 282-84 (7th Cir. 1996), the Seventh Circuit held that the § 1956 money laundering offenses and mail fraud offenses involved in that case should be grouped. The government apparently concedes that *Wilson* would be controlling as to the grouping of Glover's conspiracy, kickback, and money laundering offenses. Glover was sentenced on September 21, 1995, his appeal was argued September 13, 1996, and the decision on appeal was issued December 2, 1996. *Wilson* was argued April 1, 1996 and issued October 17, 1996.

To succeed on an ineffective assistance of counsel claim, it must be shown both that counsel's performance was deficient and that the deficient performance prejudiced the defendant. *Melvin v. United States*, 78 F.3d 327, 329 (7th Cir.), *cert. denied*, 117 S. Ct. 384 (1996). The government contends that counsel's performance could not have been deficient, at sentencing or on appeal, for failing to raise an issue that had not yet been decided by the Seventh Circuit.[3] Glover disagrees, arguing that other case law that predated the

[3] The government also contends that counsel adequately argued the issue at sentencing. As discussed below, none of the deficiency of performance issues need be resolved. Additionally, the adequacy of trial performance issue need not be resolved because, even if the grouping issue was adequately argued at sentencing, there is no dispute that it was not raised at all on appeal.

sentencing made it clear that this was a viable issue that should have been raised by effective counsel. The government also contends that Glover cannot satisfy the prejudice component of an ineffective assistance of counsel claim because the potential effect on his sentence is not significant enough to satisfy the prejudice requirement. Because it is held that Glover does not satisfy the prejudice requirement, it is unnecessary to consider the issue of deficient performance. *See Melvin*, 78 F.3d at 329.

Claimed errors in guideline calculations generally are not cognizable on a § 2255 motion. *Martin v. United States*, 109 F.3d 1177, 1178 (7th Cir. 1996), *cert. denied*, 118 S. Ct. 335 (1997); *Durrive v. United States*, 4 F.3d 548, 549-51 (7th Cir. 1993); *Scott v. United States*, 997 F.3d 340 (7th Cir. 1993). When, as here, the constitutional basis for relief on such a claim is ineffective assistance of counsel, the potential change of sentence must be a "significant" amount in order to satisfy the prejudice prong of an ineffective assistance of counsel claim. *Martin*, 109 F.3d at 1178; *Durrive*, 4 F.3d at 551. *Durrive* involved a maximum reduction of two offense levels with a possible reduction of sentence from 120 months' incarceration to somewhere between 98 and 108 months.[4] The Seventh Circuit held this was not a significant change that would satisfy the prejudice requirement. In *Martin*, the dispute involved a change of one criminal history category, which is equivalent to two offense levels. The effect in terms of length of incarceration was not specified.[5] The Seventh

[4] The low end of the guideline range would have been 87 months, but the Seventh Circuit assumed the sentencing judge would not have gone below the middle of the guideline range.

[5] Martin's original sentence was 137 months. *See United States v. Martin*, 964 F.2d 714, 716 (7th Cir. 1992); *United States v. Martin*, 1995 WL 124126 *4 (N.D. Ill. March 20, 1995)

Circuit appeared to state a *per se* rule that a change of two offense levels would not satisfy the significant change requirement. *Martin*, 109 F.3d at 1178. *See also United States v. Hubbard*, 1997 WL 639232 *4 (N.D. Ill. Oct. 6, 1997); *Gonzalez v. United States*, 967 F. Supp. 326, 332 (N.D. Ill. 1997).

The Seventh Circuit has not directly addressed the question of how much time would actually be enough to satisfy the significant change requirement. In *Martin*, 109 F.3d at 1178, the court states: "Although we recognized in *Durrive* that any extra time in prison is significant from the defendant's perspective, we adopted a rule of proportionality: the sort of increase produced by a few levels' difference in sentencing calculations cannot be raised indirectly on collateral attack by complaining about counsel's work." This implies that a change of more than a few levels can be significant. But even taking that implication as authoritative, "few" is not a precise term and the Seventh Circuit does not indicate how the difference in length of sentence should be considered. And by referring to proportionality, the Seventh Circuit may be indicating that the percentage change in sentence is also to be considered—a one-year increase doubling a one-year sentence may be considered significant even if a one-year increase to a 30-year sentence is not.

The present case arguably involves a potential change in sentence that is slightly larger (proportionally) than that involved in *Durrive*. *Durrive* involved an offense level change from 30 to 28[6] and a sentence reduction of 10 to 18.3

[6] *United States v. Durrive*, 902 F.2d 1221, 1231 n.8 (7th Cir. 1990), indicates that *Durrive's* total offense level was 30 (28 plus a two-level enhancement). With a criminal history category of II, a two-level change would have changed his guideline range from 108-135 to 87-108, the ranges referred to in *Durrive*, 4 F.3d at 549, 551.

per cent.[7] The present case involves an offense level change from 28 to 26 and a sentence reduction of 7.1 to 25 per cent.[8] The potential sentence reduction in the present case is not large enough to satisfy the significant change requirement of *Durrive* and *Martin* and other cases have so held as to proportionally larger changes. See *Unger v. United States*,— F. Supp. 2d ___, 1998 WL 337476 *3 (E.D. Wis. June 22, 1998) (reduction in total offense level from 28 to 24); *Davis v. United States*, 1998 WL 142369 *3 (N.D. Ill. March 19, 1998) (two-level reduction changing the sentence of incarceration from 51 months to 37 months). Because the error claimed in the present case did not have a significant effect on Glover's sentence, he does not state any basis for granting § 2255 relief.

IT IS THEREFORE ORDERED that defendant's motion to vacate sentence [1] is denied. The Clerk of the Court is directed to enter judgment in favor of the government and against defendant denying the § 2255 motion. If defendant wishes to appeal this order, he must file a Notice of Appeal to the United States Court of Appeals for the Seventh Circuit with the Clerk of the Court, United States District Court for the Northern District of Illinois, 219 South Dearborn Street, 20th Floor, Chicago, Illinois 60604, within sixty (60) days of the entry of the judgment in this case. Any notice of appeal should be accompanied by a request for a certificate of appealability, including a statement as to why a certificate

[7] 120 months reduced by 12 to 22 months.

[8] 84 months reduced by 6 to 21 months. However, if like *Durrive*, it is not assumed that the potential reduction is to the low end, but instead is to 6 above the low end as was the original sentence, then the maximum reduction is to 69, for a percentage change of 17.9 per cent (15/84).

should issue. *See* 28 U.S.C. § 2253; Fed. R. App. P. 22(b); 7th Cir. R. 22.1.

ENTER:
/s/ Illegible
United States District Judge

Dated: SEPTEMBER 3, 1998

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

NO. 98-4021

UNITED STATES OF AMERICA,
Respondent-Appellee,

v.

PAUL L. GLOVER,
Petitioner-Appellant.

Appeal from the United States District Court,
Northern District of Illinois, Eastern Division

No. 97-C-8382
Judge William T. Hart

BRIEF AND APPENDIX OF PETITIONER-APPELLANT PAUL L. GLOVER

Paul L. Glover
Petitioner-Appellant, Pro Se
#06488-424
P.O. Box 1000
Marion, Ill. 62959

ARGUMENT

I.

THE PREJUDICE REQUIRED IN A SECTION 2255 MOTION

A. THE DISTRICT COURT ERRED WHEN IT DISMISSED APPELLANT'S SECTION 2255 MOTION

Appellant contends in his Section 2255 Motion that his attorneys were ineffective when 1) they failed to argue at his sentencing that all the Counts should be placed in one Group, under Section 3D1.2(d) of the Guidelines, as: recommended by the Presentence investigation Report, and when 2) they failed to argue on direct appeal that Appellant had been incorrectly enhanced under Section 3D1.4 (Multiple Counts) of the Guidelines when the Sentencing Court grouped the Morey Laundering Count separately from the other Counts. Appellant then contends that his attorneys' ineffectiveness at sentencing and on direct appeal prejudiced him because if they had argued the Grouping Issue at sentencing under existing case law, and/or had raised the issue of the incorrect enhancement on direct appeal, Appellant's sentence would have been reduced by two Offense Levels, an up to 25 per cent reduction, under this Court's ruling in *Wilson v. United States*, 98 F.3d 281 (7th Cir. 1996). While the District Court noted that "The Government apparently concedes that *Wilson* would be controlling as to the grouping of (Appellant's) conspiracy, kickback, and money laundering offenses." (Appendix, Page 5a), it denied Appellant's Section 2255 Motion without considering the issue of the ineffectiveness of Appellant's attorneys. The District Court found that Appellant did not meet the "significant" prejudice rule of *Durrive v. U.S.*, supra, and *Martin v. U.S.*, supra, even though his sentence had been incorrectly enhanced two Offense Levels, which potentially increased his sentence by up to 25 per cent. As shown hereafter, Appellant does meet the

prejudice standard of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984), and is an exception to the "significant" prejudice rule of *Durrive* and *Martin*. Accordingly, the District Court erred when it dismissed Appellant's Section 2255 Motion.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

Submitted June 23, 1999*
Decided July 15, 1999

Before

Hon. DANIEL A. MANTON, *Circuit Judge*
Hon. MICHAEL S. KANNE, *Circuit Judge*
Hon. DIANE P. WOOD, *Circuit Judge*

No. 98-4021

PAUL L. GLOVER.
Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,
Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.

No. 97 C 8382
William T. Hart
Judge.

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* After an examination of the briefs and the record, we have concluded that oral argument is unnecessary. Thus, the appeal is submitted on the briefs and the record. *See* Fed. R. App. P. 34(a) (2).

ORDER

Paul Glover was convicted of conspiracy, soliciting and receiving kickbacks, money laundering, and tax evasion, and was sentenced to 84 months in prison. He filed a motion under 28 U.S.C. § 2255 to vacate, set aside, or correct his sentence, on the ground that his lawyers were ineffective in failing to argue that the sentencing court should have grouped his money laundering offenses with his conspiracy and kickback offenses under U.S.S.G. § 3D1.2. The district court denied his motion, and we affirm.

In order to successfully claim ineffective assistance of counsel, Glover would need to show that his counsel performed below a constitutional threshold and that the deficient performance prejudiced him. *See Strickland v. Washington,* 466 U.S. 668, 687 (1984). Even if we were to assume that Glover's attorneys performed inadequately, the second prong, prejudice, is missing here. Glover argues that his attorneys' failure to argue the correct interpretation of U.S.S.G. § 3D1.2 led to an adjusted offense level two levels higher than it should have been. This court has held that only a significant increase in the sentence rises to the level of the type of prejudice that will support an ineffective assistance of counsel claim on collateral attack. *Allen v. United States,* No. 97-3329, 1999 WL 243623 (7th Cir. Apr. 27, 1999); *Martin v. United States,* 109 F3d 1177, 1178 (7th Cir. 1996); *Durrive v. United States,* 4 F3d 548, 551 (7th Cir. 1993).

At sentencing, the district court determined that Glover's adjusted offense level under the Sentencing Guidelines was 28 and his criminal history category was I, resulting in a sentencing range of 78 to 97 months in prison. The court selected a midpoint in the range, sentencing Glover to 84 months in prison. Glover alleges that, but for the errors of his counsel, his adjusted offense level would have been 26, resulting in a range of 63-78 months imprisonment. Thus, he

argues, his sentence would have been 6 to 21 months lower than the 84-month sentence he received. Unfortunately for Glover, under *Martin* and *Durrive*, this potential decrease is not sufficiently significant to be cognizable on collateral attack.

The judgment of the district court is AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

Before

Hon. DANIEL A. MANION, *Circuit Judge*
Hon. MICHAEL S. KANNE, *Circuit Judge*
Hon. DIANE P. WOOD, *Circuit Judge*

October 7, 1999

No. 98-4021

PAUL L. GLOVER,
Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,
Respondent-Appellee.

Appeal from the United States
District Court for the Northern
District of Illinois, Eastern Division.

No. 97 C 8382

William T. Hart, Judge

ORDER

Petitioner-appellant filed a petition for rehearing and petition for rehearing en banc. No judge in regular active service has requested a vote on the petition for rehearing en banc, and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

PRESENTENCE INVESTIGATION REPORT
Docket No. 95 CR 40-1

UNITED STATES OF AMERICA

vs.

GLOVER, PAUL L.

Prepared For: Honorable William T. Hart
United States *District* Court Judge

Prepared By: Elisa J. Ehrlich
United States Probation Officer
Chicago, Illinois
(312) 435-7629

Assistant U. S. Attorney	Defense Counsel
Stephen Anderson	Thomas Breen
219 South Dearborn	Attorney at Law
5th Floor	53 West Jackson
Chicago, Illinois 60604	Suite 1460
	Chicago, Illinois 60604
	(312) 360-1001

Sentence Date: September 21, 1995, at 1:30 p.m.

Offense: Count One: Conspiracy to Conduct Racketeering Influenced and Corrupt Organizations; (18 USC Section 1962(d)); $250,000 Fine and/or 20 Years Imprisonment, Three Years Supervised Release, $50 Special Assessment

Counts Two, Three, Four, Eight, Nine, Ten, 14, 15, 16, 17, 18: Offer, Accept, or Solicitate to Influence Operations of Employee Benefit Plan; (18 USC Section 1954); $250,000

Fine and/or Three Years Imprisonment, One Year' Supervised Release, $50 Special Assessment

Counts Five & Six: Money Laundering (18 USC 1956(a)(1)(B)(i)); $500,000 and/or 20 Years, Three Years Supervised Release, $50 Special Assessment: Per Count

Counts 19, 20, 21, 22: Fraudulent Income Tax Returns; (26 USC Section 7206(1)); $250,000 Fine and/or Three Years Imprisonment, One Year Supervised Release, Costs of Prosecution, $50 Special Assessment

Release Status:	$4,500 Personal Recognizance Bond (Non Supervision Status)
Detainers:	None
Codefendants:	None
Related Cases:	BENNETT, Susan: 93 CR 133-1. Pled guilty to Count One on March 5, 1993. Sentencing date scheduled for September 13, 1995, Judge Gottschall
	JOHNSON, John R. Sr.: 94 CR 255-1. Pled guilty to Counts One and 13 through 15 on July 21, 1994. Sentencing date scheduled for August 29, 1995, Judge Leinenweber.

Date Report-Prepared: 8/14/95 Date Report Revised:

Identifying Data:

Date of Birth:	7/9/47
Age:	48
Race:	White
Sex:	Male

SSN No:	303-54-2473
FBI No:	49485XA2
USM No:	06488-424
Other ID No:	None
Education:	Post Graduate Degree
Dependents:	Three (Two Children & Spouse)
Citizenship:	U.S. Citizen
Legal Address:	4916 Saratoga Dowers Grove, Illinois 60515
Aliases:	None

GLOVER, Paul L.
Docket No. 95 CR 40-1.

PART A. THE OFFENSE

Charge(s) and Conviction(s)

Indictment No. 95 CR 40 is a 22-count criminal matter filed in the Northern District of Illinois on January 19, 1995, against the defendant. The offense behavior charged in Indictment No. 95 CR 40 involved racketeering conspiracy; in violation of Title 18, United State-Code, Section 1962(d); offering, accepting or soliciting to influence operations of employee benefit plan; in violation of Title 18, United States Code, Section 1954; money laundering; in violation of Title 18, United States Code, Section 1956(a) (1) (B) (I); tampering with a witness; in violation of Title 18, United States Code, Section 1512(b) (1); and filing fraudulent income tax returns; in violation of Title 26, United States Code, Section 7206(1)

The racketeering conspiracy is set forth in Count One and Consists of six individual racketeering activities. Racketeering Acts One through Three and Six entail offering, accepting or soliciting to influence operations of employee benefit plan offenses (accepting "kickbacks"). This charge is also alleged in Counts Two through Four and Eight through 18. The money laundering activities are outlined in Racketeering Act Four of Count One and Counts Five and Six. Tampering with a witness is charged in Racketeering Act Five of Count One and Count Seven. The defendant was acquitted of Count Seven. Finally, the filing of fraudulent income tax returns is alleged in Counts 19 through 22. All of the conduct charged in Counts Two through 18 entails predicate acts of the racketeering conspiracy charged in Count One.

The defendant was also charged in a count seeking forfeiture of the proceeds of the racketeering activities. The count charged that the defendant acquired and obtained revenue of

approximately $338,325, which was derived from the proceeds of the racketeering activities described below. This count is in violation of Title 18, United States Code, Section 1963(a) (1) and (3) and Section 1963(a) (2) (A) and (D). A special verdict by the Court regarding the forfeiture allegations indicated that a total of $325,000 should be forfeited by the defendant to the United States.

The defendant was tried twice in connection with this case and testified in only the first trial. His original trial which occurred from approximately April 17, 1995 to May 2, 1995, ended in a mistrial. The defendant underwent a second jury trial which ran from June 5, 1995 to June 22, 1995. On June 22, 1995, the defendant appeared before the Honorable William T. Hart and was found guilty of Counts One through Six, Eight through Ten, and 14 through 22 of the indictment. The defendant was released on a $4,500 own recognizance bond, non-reporting status. The defendant is scheduled to be sentenced on September 21, 1995, at 1:30 p.m.

The Offense Conduct

Assistant United States Attorney Stephen Anderson submitted a statement of facts, which is attached to this report and is summarized below.

Beginning in or about approximately March 1987 and continuing until approximately January 1992, the defendant was the General Counsel and Vice President of the Chicago Truck Drivers, Helpers and Warehouse Workers Union (hereinafter "CTDU"); Employee Trustee and Fund Manager of the CTDU Health and Welfare Plan and Employee Trustee of the CTDU Pension Fund, all elected positions. In holding these titles, the defendant occupied a position of trust in which he was to act as a fiduciary in the best interests of the CTDU by managing its funds. The defendant and a coconspirator, John R. Johnson Sr., were involved in multiple criminal schemes throughout the time frame iterated above

which primarily entailed the solicitation and acceptance of "kickbacks" from various investments utilizing union pension and health benefit funds. The defendant and Johnson intended to take the proceeds of these illicit activities and convert them for personal use. To further perpetrate and avoid detection of these schemes, the defendant laundered money and falsified his income tax returns. A brief synopsis of what transpired, which incorporates the individual racketeering activities, will be iterated here.

In Racketeering Act One, which occurred during March 1987 through about July 1987, the defendant and Johnson purchased approximately 168,549 shares in Coalstar Enterprises/Omega Gold for $1,011,294, without notifying or acquiring consent from the Employer Trustees. Kickback payments totalling approximately $135,000 were received and split evenly by the defendant and Johnson (thus, the defendant's share was approximately $67,500). The defendant continued to conceal this investment from the Pension Fund Board of Trustees during quarterly meetings. Additionally, the defendant did not report this income on his 1987 income tax return.

As alleged in Racketeering Act Two, beginning in approximately March 1987 and continuing through April 1987, the defendant and Johnson received kickback payments from investments with Kemper Investment Portfolios/ Government Investment Portfolios and Putnam funds through a stock broker, Susan Bennett. The defendant and Johnson invested approximately $6,550,000 from the Health and Welfare Fund of CTDU without the authority or consent of the Employee Trustees. The defendant's share of the kickback payment on this investment was approximately $15,000, which the defendant failed to report on his 1987 income tax returns.

Sometime in 1989, the CTDU Pension Fund Board of Trustees began to consider investing in real estate funds. The

defendant and Johnson solicited a broker, Susan Bennett, to present several real estate packages to the CTDU Pension Fund Trustees. The use of broker on this particular investment was not required but was utilized anyway by the-defendant and Johnson. The CTDU Pension Fund ultimately invested $10,000,000 in Sierra Capital and $5,000,000 in J.M.B. Realty. These were legitimate business investments that were profitable for the CTDU Pension Fund but also directly profited the defendant and Johnson unbeknownst to the Trustees. As charged in Racketeering Act Three, from November 29, 1989 through February 23, 1990, the defendant and Johnson solicited and received kickback payments from Bennett on multiple occasions from these investments totalling approximately $406,000, of which the defendant received about $200,000. Some of these payments were made in checks and some in currency. The defendant did not report the above proceeds on his 1988 or 1989 income tax returns. On November 1, 1989, during a meeting between the defendant, Johnson and Bennett to discuss the amounts of the kickback payments, Johnson made several verbal threats to Bennett.

In connection with the above scheme, it was necessary for the defendant and Johnson to launder several kickback checks they received from Bennett. Pursuant to Racketeering Act Four, on November 29, 1989, January 24, 1990, and February 1, 1990, the defendant and Johnson met with Timothy Evoy, an individual who was acquainted with the manager of a currency exchange in Chicago. Evoy brought the checks to Carol Palmsone, a currency exchange employee, and had her cash each of five checks totalling approximately $250,000. Palmsone required Evoy to fill out a customer signature card which Evoy completed in the name of Bennett utilizing some inaccurate identifying information of Bennett. Each of the five checks was subsequently cashed by Palmsone at a fee of

$500 per check. Additionally, Evoy charged Johnson approximately $2,250 for each check cashed.

In January 1991, after turning over the false customer signature card of Bennett, Palmsone was subpoenaed to testify before the grand jury. The defendant provided funds to Palmsone for her attorney representation. In February 1991, because Palmsone would be required to identify Bennett for the grand jury, Johnson pressed Bennett for a photograph of herself which he ultimately received. Racketeering Act Five charged that in or about February 1991, the defendant corruptly persuaded Bennett (to provide this photograph) with the intent to influence the testimony of Palmsone at the grand jury hearing. Additionally, the defendant counselled Evoy not to provide any information to authorities.

In another scheme, beginning in August 1987 and continuing through about January 1992, as charged in Racketeering Act Six, the defendant and Johnson received approximately monthly kickback payments from Ronald Marolda and David Nadell, stock brokerage company partners, primarily through investments from the CTDU Pension and Health and Welfare Funds. The payments ranged from $200 to $10,000. The defendant received a total of approximately $50,000 in kickback payments from Marolda and Nadell during this time. The defendant failed to report these proceeds on his 1987 through 1991 income tax returns.

It is the contention of the government that the defendant committed perjury when he testified falsely at his first trial including his denial of the receipt of kickback payments. The defendant is deemed to be equally culpable as Coconspirator Johnson with whom the defendant used his position as a fiduciary to violate the trust of the CTDU members and beneficiaries of the CTDU Pension and Health and Welfare Funds.

Agents from the Internal Revenue Service (Lynette Redxner) and the Department of Labor (Stephen Quisenberry and Jane

Yelvington) provided additional information regarding this case. The agents verified the facts in this case as reflected above. According to the agents, the investigation began with the Federal Bureau of Investigations in 1988 when allegations were received from taped telephone conversations with a CTDU accountant. This accountant indicated that there were questionable investments utilizing CTDU funds. The Department of Labor acquired this investigation in November 1989. The agents indicated that Susan Bennett was the initial target of this investigation based on the information received from the union accountant.

Both Bennett and Johnson agreed to cooperate with the investigation, Bennett in November 1990 and Johnson in June 1994, each providing information about the defendant. The agents maintained that the defendant has been aware of the investigation: (and testified to this effect) since 1988, when various records (including on investments, salaries and expenses) of the CTDU were subpoenaed through him. The agents opined that the defendant was the "brains of the operation and Johnson was the brawn." They asserted that the it was the defendant who had the technical expertise to fashion these types of investments and was the one who managed the paperwork.

The defendant did not acknowledge his participation in the offenses of conviction nor has he submitted a version to date. The defendant indicated at trial that he had the authority to make each of these investments and he did not receive any kickback payments from them.

Victim Impact

As indicated by the government, the primary victims in this case were the CTDU members and beneficiaries of the Pension and Health and Welfare Funds who suffered the loss of actual funds, as well as access to necessary health coverage.

Adjustment for Obstruction of Justice

The defendant was charged in Count Seven with attempting to corruptly persuade Ms. Susan Bennett with the intent of influencing her testimony. The defendant was acquitted of this count, however, he was convicted of Count One in which Racketeering Act Five entails this same conduct. Additionally, according to the government, the defendant counselled Coconspirator Evoy not to provide any information to authorities. Finally, it is the contention of the government that the defendant committed perjury during his first jury trial on this matter.

Adjustment for Acceptance of Responsibility

To date, the defendant has not submitted a written defendant's version. While a plea of not guilty does not alone preclude the possibility of acceptance of responsibility, the defendant's denial of participation in the instant offense, despite a guilty verdict, denotes a lack of personal acceptance for his actions.

Offense Level Computations

The 1994 edition of the Guidelines Manual has been used in this case.

According to Appendix A, the applicable guideline for Racketeer Influenced and Corrupt Organization (RICO) offenses is 2E1.1. Count One encompasses numerous predicate acts of the racketeering conspiracy. Pursuant to Application Note One of 2E1.1, underlying offenses should be treated as if contained in a separate count of conviction when there is more than one underlying offense. Guideline 2E1.1(a) directs the reader to assign either a base offense level of 19, or the offense level applicable to the underlying activities, whichever is higher. To determine whether subsection 2E1.l(a) (1) or (a) (2) results in the greater offense level, Chapter 3 adjustments are applied to both 2El.l(a) (1)

and (a) (2). For purposes of these guideline calculations, 2El.1(a) (2) results in the greater offense level and is therefore utilized in the ensuing calculations.

Count One (Racketeering Acts One through Three and Six)—Conspiracy to Engage in a Racketeer Influenced and Corrupt Organization (RICO); Counts Two through Four, Eight through, Ten, 14 through 18, and Relevant Conduct (Counts 11 through 13)—Offering, Accepting or Soliciting to Influence Operations of Employee Benefit Plan

Base Offense Level: The counts listed above are grouped together on one Worksheet A, pursuant to 3D1.2(d), based on aggregate harm. The guideline computations for Count One takes into account all racketeering activity related to kickbacks and also includes Counts Two through Four, Eight through Ten, 14 through 18 and relevant conduct (Counts 11 through 13), as predicate acts of the racketeering conspiracy which encompass "kickbacks." The United States Sentencing Commission Guideline for violation of Title 18, United States Code, Section 1962(d), is found in United States Sentencing Commission Guideline Manual, Section 2El.l. Guideline 2E1.1(a) (2) directs to apply the offense level applicable to the underlying racketeering activity which is 2E5.l. According to guideline 2E5.1(a) (1), the base offense level is ten for a bribe.

Specific Offense Characteristics: Pursuant to 2E5.1(b) (1), if the defendant was the fiduciary of the benefit plan or labor organization, increase by two levels.

According to 2E5.1(b) (2), the offense level is also to be increased by the number of levels: from the table in 2F1.l corresponding to the value of the improper benefit to the payer (the commission) which is greater than the value of the prohibited payment (the kickback). In this

case, the total value of the commissions received by all relevant parties is approximately. $l,802,000 ($331,000-Lelis; $48,000-Bennett; $823,000-Bennett; and $600,000-Marolda/Nadell). Therefore, pursuant to 2F1.l(b) (1) (M), if the value exceeded $1,500,000, but was less than $2,500,000, increase by 12 levels.

Victim-Related Adjustments: None.

Adjustments for Role in the Offense: None.

Adjustment for obstruction of Justice: None. It is the contention of the government that the defendant committed perjury during the initial trial in this case which would therefore merit an enhancement for obstruction. As the undersigned was not present in court during this trial, it is left to the Court's discretion to make a determination as to whether or not the defendant obstructed justice by perjurious testimony.

Adjusted Offense Level (Subtotal):

Count One (Racketeerinc Act Four)—Conspiracy to Engage in a Racketeer Influenced and Corrupt Organization (RICO); Counts Five and Six—Laundering of Monetary Instruments

Base Offense Level: The United States Sentencing Commission Guideline for a violation of Title 18, United States Code, Section 1956(a) (1) (B) *(1)*, is found in United States Sentencing Commission Guideline Manual, Section 2S1.1(a)(2), and calls for a base offense level of 20.

Specific Offense Characteristics: According to 2S1.1(b) (2) (C), if the value of the funds exceeded $200,000, but were less than $350,000, increase the offense level by two. The total amount of funds involved in the money laundering as charged in the indictment is approximately $250,000. Therefore, a two-level increase in the offense level is appropriate.

Victim-Related Adjustments: None.

Adjustments for Role in the Offense: Pursuant to 3B1.3, Abuse of a Position of Trust, if the defendant abused a position of trust in a manner that significantly facilitated the commission of the offense, increase the offense level by two levels. As the General Counsel and Vice President of the CTDU, the defendant had control over and access to union pension and health and welfare funds. It was this authority and access, which was only feasible due to the defendant's fiduciary position within the CTDU, that enabled the defendant to perpetrate this offense. Thus, a two-level increase was applied.

Adjustment for Obstruction of Justice: Pursuant to guideline 3C1.1, if the defendant willfully obstructed or impeded the administration of justice, or attempted to do so, increase the offense level by two levels. Additionally, according to Application Note 3(a) of this guideline, "threatening, intimidating, or otherwise unlawfully influencing a codefendant or witness, either directly or indirectly, or attempting to do so," constitutes obstruction. Both the government and the case agents referenced the unlawful influencing of Ms. Bennett by Coconspirator Johnson to produce a photograph of herself so that Ms. Palmsone could falsely identify her for the grand jury. Though the defendant was not directly involved in obtaining the photograph from Ms. Bennett, the defendant had knowledge of this dilemma as evidenced by the following: the defendant obtained and provided funds for Palmsone's attorney representation which directly related to this matter and there was also testimony from Johnson that the defendant was aware of the situation and told Johnson to handle it as necessary. Additionally, the defendant directed Evoy not to provide any information to authorities regarding this matter. Thus, though acquitted at trial of these

charges, the defendant is held accountable for these activities based on a standard of preponderance of the evidence for purposes of sentencing.

Adjusted Offense Level (Subtotal):

Count One (Racketeering Act Five)—Conspiracy to Engage in a Racketeer Influenced and Corrupt Organization (RICO); Tampering With a Witness

Base Offense Level: As stated above, though acquitted at trial of these charges, the defendant is held accountable for these activities based on a standard of preponderance of the evidence for purposes of sentencing. United States Sentencing Commission Guideline for a violation of Title 18, United States Code, Section 1512(b) (1), is found in United States Sentencing Commission Guideline Manual, section 2.J1.2, Obstruction of Justice. Pursuant to the cross reference-under 2J1.2(c), "if the offense involved obstructing the investigation or prosecution of a criminal offense, apply 2X3.1 (Accessory After the Fact)..., if the resulting offense level is greater than that determined above." The underlying offense in this case is the money laundering offense. Guideline 2X3.1(a) directs to apply six levels lower than the offense level plus specific offense characteristics for the underlying offense (22), which yields an offense level of 16.

Specific Offense Characteristics: None.

Victim—Related Adjustments: None.

Adjustments for Role in the Offense: None.

Adjustment for Obstruction of Justice: None. As stated, above, it is left to the Court's discretion to make a determination as to whether or not the defendant further obstructed justice by perjurious testimony.

Adjusted Offense Level (Subtotal):

Counts 19 through 22 — Fraudulent Income Tax Returns

Base Offense Level: The United States Sentencing Commission Guideline for a violation of Title 26, United States Code, Section 7206(1), is found in United States Sentencing Commission Guideline Manual, Section 2T1.l. Guideline 2Tl.1(a), directs to utilize guideline 2T4.l, the Tax Table. During 1988 to 1991, the defendant underreported his gross income by a total of approximately $250,000. Additionally, pursuant to lBl.3, relevant conduct, the defendant is accountable for an additional $82,500 not reported on his 1987 income tax returns. As directed by guideline 2T1.l(c) (1) (A), the value of the tax loss equals 28 percent of the gross income ($332,500) underreported, which yields a figure of $93,100. Thus, pursuant to 2T4.1(I), the base offense level is 14.

Specific Offense Characteristics: Pursuant to guideline 2T1.l(b) (1), if the defendant failed to report income exceeding $10,000 in any year from criminal activity, increase by two levels.

Victim-Related Adjustments: None.

Adjustments for Role in the Offense: None.

Adjustment for Obstruction of Justice: None. As stated above, it is left to the Court's discretion to make a determination as to whether or not the defendant further obstructed justice by perjurious testimony.

Adjusted Offense Level (Subtotal):

Mutiple-Count Adjustment All of the counts are grouped together on one line of Worksheet B as follows. Count One (Racketeering Acts One through Three and Six), Counts Two through Four, Eight through Ten, and 14 through 18 are

grouped together, pursuant to 3D1.2(d), based on aggregate harm. Count One (Racketeering Act Four), Counts Five, Six, 19 through 22 and the relevant conduct are grouped together with each other and the above counts pursuant to 3D1.2(c). Finally, Count One (Racketeering Act Five) and Count Seven are grouped together pursuant to 3D1.2(a) and are also grouped with Count One (Racketeering Act Four), Count Five and Count Six, pursuant to 3D1.2(c).

		Units
Adjusted Offense Level for Counts One through Six, 8 through 10, 14 Through 22 and Relevant Conduct -	26	1
Total Number of Units		1
Greater Adjusted Offense Level	26	
Increase in Offense Level	0	
Combined Adjusted Offense Level:		26

Adjustment for Acceptance of Responsibility: The defendant has not demonstrated an affirmative acceptance of responsibility for his criminal conduct. Therefore, pursuant to U.S.S.G. 3E1.l(a), the offense is not reduced by two levels. 0

Total Offense Level: 26

Chapter Four Enhancements: None. 0

Total Offense Level: 26

PART B. DEFENDANT'S CRIMINAL HISTORY:

Juvenile Adjudication(s)

None.

Adult Criminal Conviction(s)

None.

Criminal History Computation

A check with the Federal Bureau of Investigation National Crime Information Center and local police authorities, revealed no prior arrests or convictions for the defendant. Therefore, his criminal history points are zero and he has a criminal history category of I.

Other Criminal Conduct

Though not charged in the indictment nor addressed in the government's version, the agents (and subsequently the government), explained to the undersigned that funds from two local unions affiliated with the CTDU were examined (which are separate from pension or health and welfare funds), and the agents concluded that both the defendant and Johnson had increased their salaries from these funds by $86,000 each, during approximately 1989 to 1992, without authority. The government affirmed that the defendant and Johnson received these additional salaries. However, the government continued that because there was dissension among the CTDU Board of Trustees as to whether or not this conduct was authorized, no formal charges related to this conduct were initiated.

Also, information received from the Downers Grove Police Department indicated that the defendant was cited for a code violation for failure to obtain a permit for a fence. On January 25, 1993, the defendant was arrested pursuant to a warrant issued for his failure to pay the fine. The defendant was adjudged guilty and assessed a fine and court costs. The date of adjudication and the amount of the fine assessed were not available from the Downers Grove police records.

PART C. OFFENDER CHARACTERISTICS

Personal and Family Data

The defendant Paul Leonard Glover, was born on July 9, 1947, in Bedford, Indiana, where he resided until approx-

imately 1951. In 1951, he relocated to Sarasota, Florida where he remained until approximately 1963. In 1963, the defendant moved to Chicago, Illinois, and he has remained in the Chicago area since that time. The defendant's present legal address is located in Downer's Grove, Illinois.

The defendant related that his parents divorced when he was approximately six years old and he remained with his mother until the age of 14. Per an agreement by both the defendant's parents and himself, the defendant was reared by his father after the age of 14. The defendant asserted that his parent's divorce made him a more responsible person because his mother worked evenings as a waitress and the defendant was left to care for his younger sister. The defendant affirmed that he shared close relationships with all family members. The defendant continued that presently, his relationship with his mother is strained because she suffers from depression and has attempted suicide on several occasions.

The defendant reported that his father, Paul Richard Glover, died at the approximate age of 57 from a stroke. Prior to his death, he was employed as an electrician. The defendant's mother, Teresa Glover (nee: Descoli), is 64 years old and resides in Elgin, Illinois. She is unemployed and living in an apartment with a roommate.

The defendant has one sister. Cathy Sinclair (flee: Glover) is 45 years old and resides in Sarasota, Florida. She is divorced with one child and is employed as a supervisor at Neilson Television. The defendant reported that to his knowledge, no family member has a prior criminal record.

The defendant first married Maureen Conway in 1969 in Chicago, Illinois. The defendant explained that he met Ms. Conway in college in approximately 1965. The defendant related that after graduating from college, it became necessary for him to work evenings regularly and he and Ms. Conway "grew apart." They came to realize that they were

incompatible and ultimately divorced in 1980. There were no children as a result of this union.

The defendant is presently married to Deborah Clover (nee: Reineke). They met in 1981 through a mutual friend and were married in July 1982. The defendant related that he and his spouse have a strong relationship which has survived tumultuous periods of both employment and legal problems. According to the defendant, he and his wife share many common interests and values. Mrs. Glover has two children from a previous relationship with whom the defendant is very close. Brian Helfrich, age 19, and Kevin Helfrich, age 18 (both the sons of John Helfrich, Mrs. Glover's previous spouse), reside in Downers Grove, Illinois, with the defendant and his spouse.

The undersigned conducted an interview with the defendant's wife, Deborah Glover, age 43, on July 31, 1995. Mrs. Glover is employed full-time as a clothing salesperson at Sweet William in Hinsdale, Illinois. Mrs. Glover corroborated basic information about the defendant. Mrs. Glover described their marriage as "excellent" stating the defendant is "my best friend." She affirmed that they share open and honest communications. Mrs. Glover stated that she was employed part-time as a secretary for Glover and Associates until the indictment in this case (January 1995). At that time, Glover and Associates began to lose patronage and new customers have remained minimal to the present. According to Mrs. Glover, the current income from this business consists primarily of costs incurred from prior completed services. Mrs. Glover acknowledged that the company was placed in her name from the onset due to the investigation pending at that time involving the defendant. Mrs. Glover affirmed her love and emotional support for the defendant.

Physical Condition

The defendant is 6' tall, weighs 195 pounds, has brown hair and blue eyes. The defendant is not currently under the care

of a physician nor is he prescribed any medications. He reported no scars, tattoos or distinguishing marks on his body. The defendant denied any major surgeries aside from a gall bladder removal and kidney stones in the early 1980s for which he was treated at Michael Reese Hospital in Chicago, Illinois. He does not presently suffer from any known allergies and described his overall health as good.

Mental and Emotional Health

The defendant reported that his mother was diagnosed with depression and has been hospitalized on an inpatient basis in the psychiatric unit of many hospitals during the last 20 years. According to the defendant, his mother has attempted suicide on many occasions including a recent attempt wherein she laid down on the street in front of a metermaid truck. She is currently prescribed several psychiatric medications including Prozac, Valium, Dilantin and Phenobarbital and is living in an apartment with a roommate. As mentioned above, the defendant is somewhat estranged from his mother due to her recent behavior. The defendant asserted that there is no personal history of mental illness or mental health problems. He reported no present/previous treatment or counseling as the result of any mental health problems. The defendant stated that he and his first wife sought marital counseling in 1980 prior to their divorce. The defendant stated that they saw this counselor weekly for about one and a half years but he was unable to recall the name of the therapist. The defendant was cooperative during the presentence investigation process and personal interviews.

Substance Abuse

The defendant reported that at the time of his death, his father was a recovering alcoholic. While the defendant never observed any behavioral effects of alcohol on his father, he believes that his father's alcohol consumption destroyed his ability to resist, disease and ultimately led to his death. The

defendant denied any personal substance abuse problems or participation in any treatment programs for alcohol or drug usage. The defendant acknowledged that he experimented with marijuana, on a few occasions in 1967. However, he stated that presently, he does not consume any alcohol or illicit substances. On June 27, 1995, the defendant submitted a urine sample to the probation department as part of the presentence investigation process. The sample was negative for the presence of any illicit substances (verified).

Education and Vocational Skills

The defendant reportedly attended Bedford High in Bedford, Indiana, from 1961 to 1965 receiving his diploma in 1965 (unverified). The defendant next attended DePaul University in Chicago, Illinois., from September 1967 to December 1974, earning a Bachelor of Arts degree in English (verified). The defendant also attended DePaul University College of Law from September 7, 1971 to January 13, 1975, receiving his Juris Doctor (J.D.) (verified). Finally, the defendant reportedly attended the Illinois Institute of Technology in Chicago, Illinois, from 1982 to 1984, receiving a Master's degree in Labor Relations (unverified). The defendant did not receive any further educational or vocational degrees. He denied any academic or behavioral problems and described himself as an above-average student.

Employment Record

September 1992 to Present (Partially Verified)

The defendant reported that he i. self-employed as a consultant/labor lawyer for Glover and Associates, a business owned jointly by his spouse and Mr. Matt Perovic (the proceeds are split on an equal basis). The defendant estimated that his average annual income from this employment is approximately $100,000.

September 13, 1970 to July 31, 1992 (Unverified).

The defendant was employed by the Chicago Truck Drivers Union in Chicago, Illinois. He held several positions includeing General Counsel; Vice President; Health and Welfare Fund Trustee and Fund Manager and Pension Fund Trustee. The defendant earned approximately $12,775 per month by the end of this employment. The defendant committed the instant offense while employed in this capacity. However, the defendant's employment was terminated as a result of the expiration from his term of office as Vice President as well as his replacement as General Counsel rather than as a result of his participation in the instant offense.

From 1965 to 1967, the defendant was reportedly in the United States Army (unverified). His service number is US 55887381 and the defendant reported that he was honorably discharged at the rank of sergeant in 1967. The defendant maintained that he was not involved in any disciplinary actions and he did not acquire any specialized training while in the army.

Financial Condition: Ability to Pay

The defendant submitted a signed joint financial statement. The following reflects the defendant's 50 percent interest in assets and debts. Assets and liabilities marked with an asterisk (*) represent 100 ownership by the defendant. In 1983, the defendant filed for bankruptcy in Chicago, Illinois. On October 4, 1983, the defendant was discharged from debt. A review of the defendant's adjusted gross income received from the Internal Revenue Service for 1988 through 1994, reveals that the defendant earned $101,119 in 1988; $124,200 in 1989; $138,234 in 1990; $158,781 in 1991; $122,423 in 1992; $59,069 in 1993; and $143,425 in 1994. The defendant's spouse has a 50 percent interest in Glover and Associates (the other 50 percent is held by Mr. Matt Perovic); thus, the defendant has no equity in that asset. Corporation

returns indicated that Glover and Associates earned ($2,834) in 1992; $69,653 in 1993; and $117,101 in 1994. To date, the defendant has paid approximately $180,000 in attorney fees to Thomas Breen/George Murtaugh.

Assets		
Cash		
First Chicago (Checking Account)	(See Note A)	$1,250.00
Subtotal:		$1,250.00
Unencumbered-Assets		
American Mutual Life Insurance	(See Note B)	0.00
1990 Mazda Miata	(See Note C)	0.00
1989 Jeep Cherokee		2,000.00
1988 Chevrolet Blazer		4,000.00
Household Items		$25,000.00
Subtotal:		$31,000.00
Equity in Other Assets	(See Note D)	$ 0.00
Subtotal:		$ 0.00
Total Assets:		$32,250.00
Unsecured Debts		0.00
Total Unsecured Debts:		$ 0.00

NET WORTH:	$ 32,250.00
Monthly Cash Flow	
Income	
Defendant's Salary	$ 6,000.00
Spouse's Salary	1,600.00
Total Income:	$ 7,600.00
Necessary Living Expenses	
Mortgage	$ 2,200.00
Electricity	125.00
Heat/Gas	75.00
Water/Sewer	30.00
Telephone	60.00
Groceries/Supplies	1,200.00
Automobile Insurance	300.00
Health Insurance	180.00
Life Insurance	200.00
Homeowner's Insurance	30.00
Transportation	200.00
Medical	150.00
Clothing 300.00	
Education (for Children)	300.00
Total Expenses:	$ 5,350.00
Net Monthly Cash Flow:	$ 2,250.00

Note A: The defendant reported that his spouse has 100 percent interest in a money market account which he estimated at $5,000.

Note B: This life insurance policy is a term policy; therefore, there is no cash surrender value or equity in this asset.

Note C: This asset is owned solely by the defendant's spouse; thus, he has no equity in this asset.

Note D: The defendant stated that his current residence, owned solely by his spouse, was purchased in 1984 for approximately $120,000. The defendant estimated that the current fair market value of this residence is 325,000 and there is a mortgage balance of approximately $180,000. The defendant has no equity in this asset and believes he will have to sell this residence subsequent to his sentencing.

Analysis

The defendant has a net worth of approximately $32,250 and a present net monthly cash flow of $2,250. Therefore, he has the immediate ability to make some restitution and/or fine payments. However, the defendant's likely incarceration will impact his monthly income and thus, the amount he will be able to pay while in custody. It is noted that a special verdict by the Court regarding forfeiture allegations indicated that a total of $325,000 should be forfeited by the defendant to the United States which, to date, has not been satisfied. Additionally, the government has requested that the defendant be ordered to pay $100,000 in restitution (it is noted that the undersigned found the restitution to entail a total of $1,011,294). The defendant, if incarcerated, will have the $500 per year if incarcerated for more than three years, and up to $100 per year if sentenced to less than three years incarceration, through the Inmate Financial Responsibility Program.

PART D. SENTENCING OPTIONS:

Custody

Statutory Provisions: The cumulative maximum term of imprisonment for the 18 counts of conviction is 105 years. The maximum term of imprisonment for Counts One, Five and Six is 20 years respectively, pursuant to Title 18, United States Code, Sections 1962(d) and Section 1956(a) (1) (B) (i). The maximum term of imprisonment for Counts Two through

Four, Eight through Ten and 14 through 22, is three years each pursuant to Title 18, United States Code, Section 1954 and Title 26, United States Code, Section 7206(1).

Guideline Provisions: Based on the total offense level of 26 and a criminal history category of I, the guideline imprisonment range is 63 to 73 months incarceration.

Impact of the Plea Agreement

There is no plea agreement in this case as the defendant was convicted subsequent to a jury trial.

Supervised Release

Statutory Provisions: The defendant. was convicted of three Class C felonies and 15 Class E felony counts. Pursuant to Title 18, United States Code, Section 3583, the maximum term of supervised release for Class C felonies is not more than three years and for Class E felonies, not more than one year.

Guideline Provisions: The Court shall order a term of supervised release to follow, imprisonment when required by statute- For the three Class C felonies, the applicable term of supervised release is at least two years, but not more than three years, pursuant to 5D1.2(b)(2). For the 15 Class E felonies, the applicable term of supervised release is not more than one year, pursuant to 5D1.2(b) (3).

Probation

Statutory Provisions: Pursuant to Title 18, United States Code, Section 3561, the authorized term of probation for Class C and E felonies is not less than one nor more than five years.

Guideline Provisions: Pursuant to 5B1.l(a), the defendant is not eligible for probation as the applicable guideline range is not in either Zone A or B of the Sentencing Table.

Fines

Statutory Provisions: Counts One through Four, Eight through Ten, and 14 through 22 each have a respective maximum fine of $250,000. Counts Five and Six each have a respective maximum fine of $500,000. Therefore, the cumulative maximum fine for which the defendant is accountable is $5,000,000, pursuant to Title 18, United States Code, Section 3571. A special assessment of $50 is mandatory on each count of conviction for a total of $900, pursuant to Title 18, United States Code, Section 3013. Finally, a special verdict by the Court regarding the forfeiture allegations indicated that a total of $325,000 should be forfeited by the defendant to the United States.

Guideline Provisions: The fine range for this offense is from $12,500 to $125,000, pursuant to United States Sentencing Guideline 5E1.2(c)(3), the Fine Table.

Subject to the defendant's ability to pay, the Court shall impose an additional fine-amount that is at least sufficient to pay the cost to the government of any imprisonment, probation, or supervised release,-pursuant to United States Sentencing Guideline 5El.2(i).

The most recent advisory from the Administrative, Office of the United States Courts suggests a monthly cost of $1,779 for imprisonment; a monthly cost of $1,183 for community confinement; and a yearly cost of $2,344 for supervision.

Restitution

Statutory Provisions: Pursuant to Title 18, United States Code, Section 3663, the Court may order restitution to any victim of the offense. The government has indicated that the total amount of restitution is $100,000 to be paid to Chicago Truck Drivers, Helpers and Warehouse Workers Union Pension Fund, 809 West Madison, Chicago, Illinois, 60607. However, it appears to the undersigned that there was an

additional loss of $1,011,294 to the CTDU from the Coal star/Omega Gold investment which could also be ordered as restitution.

Guideline Provisions: In accordance with the provisions of the United States Sentencing Guideline 5E1.l, restitution shall be ordered where indicated.

Denial of Federal Benefits

Statutory Provisions: Denial of federal benefits is not applicable to this case.

Guideline Provisions: Denial of federal benefits is not applicable to this case.

PART E. FACTORS THAT MAY WARRANT DEPARTURE:

There are no factors concerning the offense or the offender that would warrant departure from the prescribed guidelines.

Respectfully submitted,

William T. Foster
Chief U. S. Probation Officer

by /s/ Elisa J. Ehrlich
ELISA J. EHRLICH
U. S. Probation Officer

Approved:

/s/ Gregory Prestipino
GREGORY A. PRESTIPINO
Supervising U.S. Probation Officer August 14, 1995

Attachments: Government's Version
(Including Victim Impact Statement)
Worksheets

EJE:eje/cjl

UNITED STATES DISTRICT COURT JUDGE
Office of the Chief Probation Officer
55 East Monroe, Suite 1500
Chicago, Illinois 60603

Honorable William T. Hart — September 27, 1995

STATEMENT OF CORRECTION

RE: GLOVER., PAUL L.
Docket No. 95 CR 40-1
Disposition Date: September 21, 1995

On September 21, 1995, during the sentencing hearing of the above-named individual, Your Honor ordered that the following corrections be made to the presentence investigation report:

Offense Level Computations.

Count One (Racketeering Acts One through Three and Six) —Conspiracy to Engage in a Racketeer Influenced and Corrupt Organization (RICO); Counts Two through Four, Eight through Ten, 14 through 18, and Relevant Conduct (Counts 11 through 13)—Offering, Accepting or Soliciting to Influence Operations of Employee Benefit Plan

Adjustment for Obstruction of Justice: The Court determined at the time of sentencing that the defendant committed perjury during his initial trial on this matter. Thus, pursuant to 3C1.1, Obstruction of Justice, a. two level increase is applied.	2
Adjusted Offense Level (Subtotal):	26
Total Offense Level:	26

Multiple-Count Adjustment

As ruled by the Court at sentencing, Counts One (Racketeering Act Four), Count Five, arid Six are not groupable as they do not meet any of the requirements of 3D1.2. All of the other counts are grouped together on one line of Worksheet B as follows: Count One (Racketeering Acts One through Three and Six), Counts Two through Four, Eight through Ten, and 14 through 18 are grouped together, pursuant to 3D1.2(d), based on aggregate harm. Counts 19 through 22 and the relevant conduct are grouped together with each other and the above counts pursuant to 2 (c). Finally, the relevant conduct incorporated in Counts One (Racketeering Act Five) and Seven are grouped together pursuant to 3D1.2(a) and are also grouped with Count One (Racketeering Act Four), Count Five and Count Six, pursuant to 3D1.2(c).

Adjusted Offense Level for Counts One (except Racketeering Act Four) through Four, Eight through Ten, 14 through 22-and Relevant Conduct	26	1
Adjusted Offense Level for Counts One (Racketeering Act Four), Five and Six	26	1
Total Number of Units		2
Greater Adjusted Offense Level	26	
Increase in Offense Level		2
Combined Adjusted Offense Level:		28
Adjustment for Acceptance of Responsibility: The defendant has not demonstrated an affirmative acceptance of responsibility for his criminal conduct. Therefore, pursuant to U.S.S.G. 3E1.1(a), the offense is not reduced by two levels		0
Total Offense Level:		28

PART D. SENTENCING OPTIONS:

Custody

Guideline Provisions: Based on the total offense level of 28 and criminal history category of I, the guideline imprisonment range is 78 to 97 months incarceration.

Respectfully Submitted,

/s/ Elisa J. Ehrlich
ELISA J. EHRLICH
U.S. Probation Officer
Telephone: 312/435-7629

Reviewed by:

/s/ Gregory A. Prestipino
GREGORY A. PRESTIPINO
Supervising
U.S. Probation Officer

EJE/eje/dr

Attachment: Corrected Worksheets A & D

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Docket No. 95 CR 40

UNITED STATES OF AMERICA,
Plaintiff,

vs.

PAUL GLOVER,
Defendant.

Chicago, Illinois
September 21, 1995
1:30 o'clock pm.

TRANSCRIPT OF PROCEEDINGS - Sentencing
BEFORE THE HONORABLE WILLIAM T. HART

For the Defendant:

APPEARANCES

For the Plaintiff: HON. JAMES B. BURNS
UNITED STATES ATTORNEY
BY: MR. STEPHEN D. ANDERSON and
MR. DAVID BUVINGER
219 South Dearborn
Chicago, Illinois 60604

For the Defendant: MR. GEORGE J. MURTAUGH, JR.
100 W. Monroe, Suite 1800
CHICAGO, ILLINOIS 60603

Court Reporter: FRANCES CACIOPPO, CSR, RPR
Official Court Reporter
219 S. Dearborn Street, Suite 2502-A
Chicago, Illinois 60604
(312) 435-5561

THE CLERK: 95 CR 40, United States of America versus Paul Glover for sentencing.

THE COURT: Good afternoon.

MR. ANDERSON: Good afternoon, your Honor.

MR. MURTAUGH: Good afternoon, your Honor. George Murtaugh on behalf of Mr. Glover.

MR. ANDERSON: On behalf of the United States, Stephen Anderson and David Buvinger.

MS. EHRLICH: Elisa Ehrlich, U.S. Probation.

THE COURT: Ladies and gentlemen, I will begin the proceedings by inquiring first of counsel for Mr. Glover as to whether or not you and Mr. Glover have reviewed the presentence investigation and discussed it.

MR. MURTAUGH: We have, your Honor.

THE COURT: Do you have any changes to propose?

MR. MURTAUGH: No, your Honor.

THE COURT: No changes to propose to the presentence investigation report?

MR. MURTAUGH: None at all, your Honor.

THE COURT: The government, I understand, has changes to propose.

MR. ANDERSON: Yes, your Honor.

The United States has filed with the Court the Government's position paper with regard to sentencing factors. I believe that that has been provided to the Court.

THE COURT: I have it.

MR. ANDERSON: If your Honor wishes, I could go over that again, but it has been provided to the Court.

In essence, there is three key areas in which we believe that the preparation of the preliminary PSI and the final copy of the PSI is inaccurate. Those areas are, one, the area of grouping; secondly, an area in which Mr. Glover's perjury at trial needs to be taken into account in the sentencing; and, third, his place of leadership within the conspiracy and the various conspiracies within this case.

Within each of those areas the United States has provided the Court research in which other circuits have held that the increases that the United States recommends here have been found to be appropriate.

If your Honor wishes, I can go into more detail in each of those areas.

THE COURT: Well, I will take up each one. The first question of grouping, the probation officer has grouped all of the offenses together rather than separately.

Mr. Murtaugh, do you want to comment on that?

MR. MURTAUGH: No, your Honor. I just think it's appropriate. It's one common—if the jury was and did believe apparently that it was one joint effort by Johnson and Mr. Glover, I think that all of the transactions that the government asserts should be considered individually ought not be considered individually. I think there are appropriately grouped.

THE COURT: Mr. Anderson?

MR. ANDERSON: The United States' position is set forth. That is, although the Seventh Circuit has not ruled on this issue, other Circuits have, including the First Circuit, the Fourth Circuit, the Tenth Circuit, the Ninth and the Eleventh Circuits.

Each of these circuits have held that in similar fact situations that they should not be grouped. That is, there are separate victims with regard to the money laundering and the underlying offenses. That is the position of the United States.

THE COURT: I think it's clear. I think you are clearly right, that the case law is overwhelming in your favor on this point. I have to agree that the offenses of money laundering, kickback and tax should be separately grouped. We will treat them and I will direct the probation officer to submit a revised presentence investigation that separately groups the offenses. We will move on from there. I believe you are clearly right on that point.

Your next point is with respect to what?

MR. ANDERSON: The second is with regard to the obstruction of justice, your Honor. There it's the position of the United States, the initial position is that the defendant.

[Docketed Oct. 2, 1995]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case Number: 95 CR 40-1

UNITED STATES OF AMERICA

v.

PAUL L. GLOVER

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

THE DEFENDANT:

☐ pleaded guilty to count(s).

☒ was found guilty on count(s) 1 through 6, 8, 9, 10, 14 through 22 after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section: 18 USC 1962 (d)
Nature of Offense: Conspiracy to Conduct Racketeering
Date Offense Concluded: January 1992
Court Number(s): One

Title & Section: 18 USC 1954
Nature of Offense: Offer, Accept, or Solicitate to Influence Operations of Employee Benefit Plan
Date Offense Concluded: January 1992
Court Number(s): 2, 3, 4, 8, 9, 10, 14, 15, 16, 17, 18

Title & Section: 18 USC 1956(a)(1)(B)(i)
Nature of Offense: Money Laundering
Date Offense Concluded: 2/1/90
Court Number(s): 5 & 6

Title & Section: 26 USC 7206(1)
Nature of Offense: Fraudulent Income Tax Returns
Date Offense Concluded: 4/15/92
Court Number(s): 19, 20, 21, 22

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☒ The defendant has been found not guilty on count(s) 7, 11, 12 and 13 and is discharged as to such count(s).

☐ Count(s)___(is)(are) dismissed on the motion of the United States.

☒ It is ordered that the defendant shall pay a special assessment of $ 900.00, for count(s) 1-6, 8, 9, 10, 14-22, which shall be due ☒ immediately. ☐ as follows:

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 303-54-2473

Defendant's Date of Birth: 7/9/47

Defendant's Mailing Address:

4916 Saratoga
Downers Grove, Illinois 60515

Defendant's Residence Address:

Same as above

Date if Imposition of Sentence: September 21, 1995

Signature of Judicial Officer: William T. Hart

Name & Title of Judicial Officer:
William T. Hart, U.S. District Judge

Date: September 21, 1995

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of EIGHTY-FOUR (84) MONTHS on Counts 1, 5 and 6; THIRTY-SIX (36) MONTHS on Counts 2, 3, 4, 8, 9, 10, 14, 15, 16, 17 and 18; THIRTY-SIX (36) MONTHS on Counts 19, 20, 21 and 22. All terms imposed are to run Concurrent. Pursuant to Title 29, United States Code, Section 504, the defendant may not in any capacity be involved in any labor organization for a period of thirteen years after end of imprisonment.

The defendant being a lawyer; the Clerk of the Court is directed to send copies of this judgment and commitment order to The Attorney and Disciplinary Commission and to The Executive Committee of this Court.

Defendant informed of his right to file a timely notice of appeal.

☐ The court makes the following recommendations to the Bureau of Prisons:

☐ The defendant is remanded to the custody of the United States marshal.

☐ The defendant shall surrender to the United States marshal for this district.

☐ at __am/pm on __
☐ as notified by the United States marshal.

☒ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.

☒ Before 2 p.m. on November 28, 1995.
☒ as notified by the United States marshal, an/or
☒ as notified by the probation office.

RETURN

I have executed this judgment as follows:

Defendant delivered on __ to __ at__, with a certified copy of this judgment.

United States Marshal
Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of THREE (3) YEARS.

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

☒ The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

☐ The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

☒ The defendant shall not possess a firearm or destructive device.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition:

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendants criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

RESTITUTION AND FORFEITURE

RESTITUTION

☐ The defendant shall make restitution to the following persons in the following amounts:

Name of Payee	Amount of Restitution

Payments of restitution are to be made to:

☐ the United States Attorney for transfer to the payee(s).

☐ the payee(s).

Restitution shall be paid:

☐ in full immediately.

☐ in full not later than_____

☐ in equal monthly installments over a period of _____ months. The first payment is due on the date of this judgment. Subsequent payments are due monthly thereafter.

☐ in installments according to the following schedule of payments:

Any payment shall be divided proportionately among the payees named unless otherwise specified here.

FORFEITURE

☒ The defendant is ordered to forfeit the following property to the United States:

the total sum of $350,000 pursuant to Title 18, U.S.C. Sections 982and 1963 (See attached preliminary order of forfeiture dated 9/21/95)

Defendant is further ordered to pay the costs of prosecution to the United States in the sum of $16,811.84.

STATEMENT OF REASONS

☒ The court adopts the factual findings and guideline application in the presentence report.

OR

☐ The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

Guideline Range Determined by the Court:

Total Offense Level: 28

Criminal History Category: I

Imprisonment Range: 78 to 97 months

Supervised Release Range: 1 to 3 years

Fine Range: $12,500 to $5,000,000

☐ Fine is waived or is below the guideline range, because of the defendant's inability to pay.

Restitution: $———.

☐ Full restitution is not ordered for the following reason(s):

☒ The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

☐ The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

OR

The sentence departs from the guideline range

☐ upon motion of the government, as a result of defendant's substantial assistance.

☐ for the following reason(s):

[Filed Apr. 16, 1996]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 95-3346

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

PAUL GLOVER,
Defendant-Appellant.

Appeal from the United States
District Court, Northern District
No.: 95 C 40
Judge Hart

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT, PAUL GLOVER

GEORGE J. MURTAUGH, JR.
100 W. Monroe Street
Suite 1800
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THOMAS M. BREEN
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312/360-1001

Attorneys for Defendant-
Appellant, PAUL GLOVER

ORAL ARGUMENT REQUESTED

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No. 95-3346

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Plaintiff-Appellee,

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Attorneys for Defendant-
Appellant, PAUL GLOVER

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NO. 95-3346

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

PAUL GLOVER,
Defendant-Appellant.

Appeal from the United States
District Court, Northern District
No.: 95 C 40
Judge Hart

CERTIFICATE OF INTEREST

1. Full name of all parties: PAUL GLOVEP..
2. Does not apply, not a corporation.
3. All finns or associates who have appeared in the District Court or are expected to appear before this Honorable Court of Appeals:

THOMAS M. BREEN
Martin, Breen & Merrick
53 W. Jackson Blvd., Suite 1460
Chicago, IL 60604
312/360-1001

GEORGE J. MURTAUGH, JR.
100 W. Monroe Street
Suite 1800
Chicago, IL 60603
312/781-0940

DATED this 15th day of April,

/s/ George J. Murtaugh, Jr.
GEORGE J. MURTAUGH, JR.

TABLE OF CONTENTS

	Page
CERTIFICATE OF INTEREST	101
TABLE OF CONTENTS	102
TABLE OF CASES AND AUTHORITIES	103
JURISDICTIONAL STATEMENT	104
ISSUES PRESENTED ON APPEAL	105
STATEMENT OF THE CASE	106
SUMMARY OF ARGUMENTS	107
STATEMENT OF FACTS	107
ARGUMENTS:	
I. THE DEFENDANT WAS DENIED A FAIR TRIAL BY THE INTRODUCTION OF HIS INCOMPLETE TESTIMONY FROM A PRIOR TRIAL	115
II. THE DISTRICT COURT ERRED IN ENHANCING DEFENDANT'S SENTENCE UPWARD AS A RESULT OF HIS TESTIMONY AT A PREVIOUS TRIAL	120
CONCLUSION	127

TABLE OF CASES AND AUTHORITIES

Page

I. THE DEFENDANT WAS DENIED A FAIR TRIAL BY THE INTRODUCTION OF HIS COMPLETE TESTIMONY AT A PRECEDING TRIAL.

United States v. Soures, 736 F.2d 87 (3d Cir. 1984) 118
United States v. Sweiss, 814 F.2d 1208 (7th Cir. 1986) 115-116
United States v. Walker, 652 F.2d 708 (7th Cir. 1980) 115, 118

II. THE TRIAL COURT ABUSED ITS DISCRETION BY ENHANCING DEFENDANT' S SENTENCE FOR PERJURY AT A PRIOR TRIAL OF THIS CASE

United States v. Hubbard, 929 F.2d 307 (7th Cir. 1991) 120
United States v. Jones, 983 F.2d 1425 (7th Cir. 1992) .. 126
United States v. Lozoya-Morales, 931 F.2d 1216 (7th Cir. 1991) 125
United States v. Lueddeke, 908 F.2d 230 (7th Cir. 1990) 121
United States v. Polland, 994 F.2d 1261 (7th Cir. 1993) 127
United States v. Stout, 936 F.2d 423 (9th Cir. 1991) ...121, 125
United States v.Valdez, 16 F.3d 1324 (1994) 122

JURISDICTIONAL STATEMENT

The District Court had jurisdiction pursuant to 18 U.S.C., §3231.

This Court has jurisdiction pursuant to 28 U.S.C., § 1291, an appeal from a final judgment.

The sentence in this case was entered on September 21, 1995. Notice of Appeal was timely filed on September 24, 1995.

ISSUES PRESENTED ON APPEAL

I.

WAS THE DEFENDANT DENIED A FAIR TRIAL BY THE INTRODUCTION OF HIS INCOMPLETE TESTIMONY AT A PRECEDING TRIAL?

II.

DID THE DISTRICT COURT ERR BY ENHANCING DEFENDANT'S SENTENCE FOR PERJURY AT A PRIOR TRIAL OF THIS CASE?

STATEMENT OF THE CASE

Defendant, PAUL GLOVER (herinafter "Glover"), appeals from a judgment entered by the Honorable William D. Hart on September 21, 1995.

Following a jury trial, the Court entered judgment on 18 U.S.C. § 1962(d); Conspiracy; 18 U.S.C. § 1954, Offer or Acceptance to Influence Operation of an Employee Benefit Plan; 18 U.S.C. § 1956(a) (1) (B), Money Laundering; and 16 U.S.C. § 7206(1), Fraudulent Income Tax Returns. The District Court entered a sentence of 84 months and 36 months, concurrently, and a term of three years supervised release.

SUMMARY OF ARGUMENTS

I.

THE DEFENDANT WAS DENIED A FAIR TRIAL BY THE INTRODUCTION OF HIS INCOMPLETE TESTIMONY FROM A PRIOR TRIAL

This case was tried to two juries, the first jury was unable to reach a verdict; the second convicted the defendant. Defendant, PAUL GLOVER (hereinafter "Glover"), testified at the first trial, he did not testify at the second. However, the District Court allowed the Government to introduce portions of Glover's testimony from the first trial as admissions.

Defense counsel sought to introduce the entirety of Glover's testimony, after redacting 30 pages of background information. The Court denied that request and overruled an objection to the introduction of the testimony.

Defendant argues that this procedure denied him a fair trial.

II.

THE DISTRICT COURT ERRED IN ENHANCING DEFENDANT'S SENTENCE UPWARD AS A RESULT OF HIS TESTIMONY AT A PREVIOUS TRIAL

At sentencing, the District Court noted that, in its opinion, Glover had perjured himself at the first trial. Thus, the Court enhanced Glover's sentencing level two additional points.

On appeal, defendant argues that the determination to enhance the sentence was incorrect under the applicable facts and law.

STATEMENT OF FACTS

The testimony at the trial of this case revealed that in 1985, Glover was elected an officer of the Chicago Truck Drivers Union Local 705, Independent ("C.T.D.U."). Concurrent with

his Union position, Glover also assumed responsibilities with Taft-Hartley Trust Funds sponsored by the Union. The union sponsors a Health and Welfare Fund and a Pension Fund. (Tr. 46-59, 87.)

The Trust Funds are operated by two Union and two management trustees. Each Fund also has a Fund Manager who makes day-to-day decisions. (Tr. 90.) The Funds had money from weekly contributions as well as reserves and assets, which were invested in various types of accounts and instruments. (Tr. 146.) The Trust Funds had investment policies governing the selection and variety of investments. (Tr. 166.)

The C.T.D.U. Funds made investments in certain vehicles including Putnam and Kemper Funds, Coalstar stock, JMB Realty and Sierra and stocks through M.D. Sass, a broker. (Tr. 276-305.) These various investments triggered payments of commissions to brokers.

John Johnson ("Johnson") was a Union officer who was elected with Glover. Johnson served as Fund Manager for the Pension Fund, Glover did the same for the Welfare Fund. (Tr. 305, 323.)

Johnson and Glover reviewed an investment for the Pension Fund in a stock called "Coalstar." In 1987, the Pension Fund had $1 million in bonds in the Mid-City Bank. (Tr. 322.) The bonds were sold by Johnson and Glover to generate money for investment in Coalstar. This transaction was accomplished without any action by. the Pension Fund Trustees. (Tr. 322-23.) The investment in Coalstar was made through an individual named John Lelis ("Lelis") who received a commission in excess of $300,000 on the investment. Johnson testified that Lelis paid approximately $120,000 of that commission to him and that he split the money with Glover. (Tr. 329.)

In 1989, the Pension Fund made investments in real estate funds. Commission resulting from those investments were paid to Sue Bennett ("Bennett"). The specific real estate funds were JMB Realty and Sierra. (Tr. 357.) The commissions paid by the Funds varied from 4-7 percent. (Tr. 361.) After the Funds invested approximately $15 million in Sierra and JMB Realty, Johnson testified that on November 1, 1989, he, Glover and Bennett met at the Italian Village Restaurant. At the meeting, kickbacks were discussed (Tr. 365) and according to Johnson, Bennett began to pay him money about one month later. (Tr. 379.) The money was paid by check and Johnson negotiated the checks at a currency exchange through a man named Tim Evoy ("Evoy"). (Tr. 380-85.) Johnson testified that he divided the cash which he received from Evoy with Glover. (Tr. 387.)

Johnson told the jury that he used this check procedure to obtain cash and that Bennett also made payments of $60,000 and. $90,000 in cash, which he said he split with Glover. (Tr. 391.)

Johnson also described his relationship with Ron Marolda ("Marolda"), a stockbroker. Marolda told Johnson that if the Pension Fund invested money through M.D. Sass Company, he would be in a position to earn commissions and kickback $15,000-$16,000 per month. (Tr. 409-13.) Johnson told the jury that he discussed this plan with Glover, who agreed. (Tr. 414.) In 1990, Marolda ceased making payment as he claimed he was not getting any business from M.D. Sass Company. (Tr. 423.)

In April of 1994, Johnson was indicted for several offenses regarding his failure to pay income taxes and Union activities. Johnson agreed to testify about his activities and Glover's alleged involvement. (Tr. 210-14.) In exchange for his testimony, Johnson entered a plead to one count of Racketeering and three counts of Tax Evasion in exchange

for a sentence of 30 months. (Tr. 219.) Johnson also admitted to use of cocaine on a regular basis and abuse of alcohol. (Tr. 275, 532.)

At trial, the Government called several witnesses who served as trustees of the Funds to describe their roles in the Fund administration and the investments described by Johnson. (Tr. 675, 760, 798, 869.)

Lelis testified at trial that he first met Johnson in 1986. He introduced Johnson to a venture known as Coalstar which was being set up to mine coal in Indiana. (Tr. 622.) Lelis sought investors for Coalstar and reached an agreement for payment of finders' fees to be paid to him for any investors he located. (Tr. 626.)

In 1987, Lelis met with Johnson and suggested that C.D.T.U. invest in Coalstar. Lelis and Johnson negotiated payment to Johnson (who said he was splitting with Glover) $140,000. (Tr. 630.) In 1987, the Pension Fund purchased stock in Coalstar and Lelis was paid $331,000. He negotiated checks and paid $40,000 in cash to Johnson. (Tr. 650) In total, Lelis stated that he paid Johnson $135,000.

Bennett was called as a witness at trial and told the jury about her relationship with Johnson. Bennett testified that she became a stockbroker in 1984 and that she met Johnson in 1986. (Tr. 973.) She approached Johnson to sell him investment products marketed by her employer, Shearson Bros. (Tr. 980.) Bennett told the jury that she met Glover in Johnson's office. The C.T.D.U. Funds began making some investments through Bennett. As of January, 1987, approximately $1.9 million had been invested. In April of 1987, Bennett received a commission check for $48,000. She told the jury she believed she was going to lend $30,000 to a Mr. Simon. Frangos ("Frangos"). (Tr. 1006.) She assembled $30,000 in cash and met Johnson sat Ed Debevic's Restaurant. She gave the money to Johnson to give to

Frangos and as of 1995, did not know if Frangos ever got the money. (Tr. 1008.)

In 1988, Bennett was working for American Capital Equities and gave Johnson and Glover some information regarding real estate investments. Bennett set up real estate presentations for JMB Realty and Sierra. Bennett was given a broker of record letter by the Funds. (Tr. 1012-14.) In October of 1989, the Pension Fund agreed to invest in JMB Realty. On November 1, 1989, Bennett stated she met Johnson and Glover at the Italian Village Restaurant. (Tr. 1020.)

Bennett maintained that Glover talked about commissions and wrote numbers on a page of legal paper. He told her that she would have to pay part of her commission to him and Johnson. (Tr. 1022). Johnson told her that she could not tell anyone about this and not to mention Glover's name to anyone. (Tr. 1023.) When Bennett began receiving commissions, she got two checks each for $50,000. (Tr. 1031.) Bennett gave Johnson the two checks and $6,000 in cash at a meeting in a restaurant. Johnson had earlier made Bennett give him a ring. (Tr. 1032.)

Bennett later received six additional commission checks, totalling approximately $275,000. She gave three of the checks totalling $150,000 to Johnson. (Tr. 1035.) About two weeks later, Johnson called from California and stated that he needed $20,000 in cash. In February of 1990, Bennett alleged that she gave Johnson $60,000 in cash. (Tr. 1040.) The next month, Bennett alleged that she gave Johnson $90,000 and wrote herself a letter in which she outlined her payment of commission monies. (Tr. 1044.) Bennett believed she paid Johnson over $406,000. (Tr. 1049.)

In 1990, the Internal Revenue Service ("I.R.S.") contacted Bennett, who had not yet filed her 1988 tax return. Bennett was interviewed in the U.S. Attorney's Office, but did not

disclose the payments to Johnson. (Tr. 1053.) The U.S. Attorney revoked a proffer letter to Bennett, she later contacted an agent and asked to be re-interviewed. (Tr. 1058.) Bennett arranged to meet Johnson while wearing a tape recorder. Bennett later requested and receive immunity, she entered a plea agreement regarding two misdemeanor tax offenses. (Tr. 1073.)

The Government called Evoy as a witness. Evoy testified that he knew Johnson and that he had once received some legal advice from Glover. (Tr. 1159.) Evoy knew Wayne Gablin ("Gablin") who owned a currency exchange. Johnson asked Evoy to arrange to cash several checks in the approximate amount of $50,000. Evoy arranged to do so through Gablin's former employee, Carol Palmsone ("Palmsone") . Palmsone cashed the checks which bore the name "Susan Bennett" and Evoy gave the money to Johnson, keeping $2,250 for himself. (Tr. 1157.) This process was repeated and on each transaction, Palmsone was paid $500. (Tr. 1161.) Evoy cashed five checks for Johnson. (Tr. 1166.)

Palmsone was questioned by Government agents about the checks and she called Evoy who, in turn, met with Glover. Evoy said he told Glover that he could not reach Johnson and advised Glover of the check cashing. (Tr. 1176.) Johnson met Evoy and gave him the name of a lawyer for Palmsone and $1,200 for fees. (Tr. 1178.) Paimsone later requested a picture of Bennett from Evoy who passed the request on to Johnson.

Palmsone testified and described her conversations and actions in cashing checks for Evoy. (Tr. 1198-1207.) When initially questioned by agents, she lied and said Bennett cashed the checks. (Tr. 1210.)

Kathy Rugendorf ("Rugendorf") was called as a witness. She was Glover's former secretary. (Tr. 1229.) She described her duties as Glover's secretary. (Tr. 1220-37.) She also described Glover's schedule and a book in which she alleged he kept $100 bills. (Tr. 1260-65.)

The Government called David Nadell ("Nadell") as a witness. Nadell was a stockbroker and partner with Marolda. (Tr. 1363.) Nadell testified under a grant of immunity. In 1987, he worked with Marolda as an institutional stockbroker. (Tr. 1367.) They later established their own firm. When Marolda established a relationship with the C.T.D.U. Fund, he told Nadell that Johnson wanted money. (Tr. 1374.) Nadell identified bank records of cash withdrawals. (Tr. 1389.) Nadell and Marolda discussed the monies that Marolda passed to Johnson and Glover in exchange for stock orders through M.D. Sass. (Tr. 1392.)

Marolda was the Government's last witness at trial. He testified that he worked as a stockbroker and met Johnson in 1987. (Tr. 1416.) Marolda also testified under a grant of immunity. (Tr. 1418.) He told the jury that after meeting Johnson, he sought Union Fund investment work and Johnson agreed to provide such work in exchange for money. (Tr. 1420.) Marolda discussed kickbacks with Johnson and that he and Nadell decided to pay money to Johnson and Glover. (Tr. 1433.) Marolda stated that he paid money to Johnson in installments from $600 to $5,000. (Tr. 1442.) He stated he made about 36 payments and that he gave money to Glover on 10 occasions. (Tr. 1445.)

Following Marolda's testimony, the District Court allowed the Government to read certain portions of Glover's testimony from the first trial which had resulted in a hung jury. The Court denied a defense request to read the testimony in its entirety. (Tr. 1575, 1579.)

Both parties then rested. Following arguments and instructions, the jury convicted Glover on Racketeering and tax violations.

At sentencing, the Court enhanced Glover's guideline level by two (2) points on the basis that he perjured himself at the first trial. The Court sentenced Glover to 84 months of incarceration and three years supervised release. Pursuant to

the jury's forfeiture order, the Court ordered forfeiture of $325,000 and declined to impose additional Costs.

The defendant appeals from the conviction and sentence.

ARGUMENTS

I.

THE DEFENDANT WAS DENIED A FAIR TRIAL BY THE INTRODUCTION OF HIS INCOMPLETE TESTIMONY FROM A PRIOR TRIAL

As noted earlier, this case was tried twice, the first trial resulted in a hung jury. Defendant testified at the first trial- and he elected to remain silent at the second. However, the Government successfully sought leave from the District Court to introduce parts of the defendant's testimony from the first trial, over the objection of defense counsel. (Tr. 1579-89.)

In response to the Government's proposal to read an edited version of some of the transcript, defense counsel requested leave to redact 30 pages of background information and read the entire remaining 120 pages of the transcript. The District Court denied that offer. (Tr. 1572.)

Federal Rule of Evidence 106 codifies the doctrine of completeness. The Rule provides that:

> Statements when a writing or recorded statement or part thereof is introduced by a party an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought to in fairness be considered contemporaneously with it.

Defendant argues that his request to admit the remainder of his testimony (except background information) was appropriate under the above Rule. *United States v. Walker*, 652 F.2d 708 (7th Cir. 1980)

We note that this Court will review the decision to deny that portion of the transcript under the standard of abuse of discretion. Defendant argues that the trial court's denial of the request was such an abuse of the safeguards provided by F.R.E. 106 which prevents a party from gaining an advantage by editing a prior statement. *United States v. Sweiss*, 814 F.2d

1208 (7th Cir. 1986) Portions of the remainder of defendant's testimony have been reproduced in Defendant's Appendix. These sworn statements could have been introduced at trial, along with those sections which the Government chose to read without any undue hardship.

Of course it would take time to read 120 pages of testimony, but, the use of time is not an appropriate criteria, for denying the applicability of F.R.E. 106 to the procedure employed by the Government.

The Government made the choice to introduce part of Glover's testimony. As the record reflects (Tr. 1579-90), the Government was allowed to select a small portion of the defendant's testimony, but that portion nonetheless described his involvement in the Coalstar transaction and Kemper investments (Tr. 1579), as well as the sale of bonds (Tr. 1583), and the prospectus for real estate transactions. (Tr. 1587.) This wide-ranging selection of topics by the Government made it almost impossible to select a few paragraphs here and there from the remaining testimony and to represent that these selections constituted "completeness" regarding the selected topics.

The trial court abused its discretion in this case as it failed to recognize the very purpose of the Doctrine of Completeness. The remainder of the transcript constituted evidence which ought to in fairness have been considered by the jury.

The District Court gave no reason for its denial of the request to read the remainder of the transcript in its entirety. The record reflects the following:

"THE COURT: He is not going to testify.
Okay. Well, then we will have to take a recess to check the parts of the transcript. Assuming they are allowed to use it, do you want parts read?

MR. MURTAUGH: Our position, I guess, is in its entirety.

THE COURT: You want it read in its entirety?

MR. MURTAUGH: The entirety.

THE COURT: That motion will be denied. If you have some specific parts of its that you want—

MR. BREEN: Then, Judge, whatever part they want to put in, if they are putting a name in or an investment in, then the entirety of his testimony regarding that name, his relationship to that party or investment should go in.

THE COURT: You have to be more specific than that. All right. You may read the parts you wish.

MR. ANDERSON: Okay.

MR. BUVINGER: Thank you, your Honor."

(Tr. 1566.)

The Court later ruled that the statements chosen by the Government constituted admissions dealing with Glover's Trust Fund activities and invited the defense to select portions which explained the Government's selected readings. (Tr. 1570.) This solution, however, does not comport with F.R.E. 106 because portions could not explain or clarify all of the topics covered by the Government's selection of topics.

At the first trial, Glover testified and did indeed deny his guilt. His explanations of the various conduct attributed to him and his background constituted approximately 100 pages on direct examination. In order to explain those particular acts to which he purportedly admitted fairness, required that he be allowed to submit testimony which reflected his explanations.

Nothing in F.R.E. 106 required that a consideration of fairness require a condensation of the explanation into a few passages.

The previously cited case of *United States v. Walker* dealt with a situation in which the Government submitted one-half of a defendant's testimony at a prior trial. As the Court noted in that case, the key consideration was not based upon how long it would take to introduce the evidence of explanation, but rather what was necessary to prevent an unfair one-sided presentation of evidence. *United States v, Walker,* 652 F.2d 708, 713 (7th Cir. 1980).

It is clear that the Rule does not require instruction of irrelevant testimony that explains nothing. *United States v. Soures,* 736 F.2d 87 (3d Cir. 1984). This would apply to defendant's background, however, defense counsel offered to redact that portion.

However, other portions of the earlier testimony clearly rebutted or explained certain evidence and actions. For example, the Government proffered Glover's testimony on Coalstar, he explained that testimony at pages 27-29, the jury never heard that explanation. Similarly, Bennett was discussed in the Government's selection of testimony, but Glover's testimony at pages 81-84 was never heard by the jury.

This problem could not be remedied by requiring defense counsel to edit his client's testimony into a choppy montage of topics which was made unclear by the absence of temporal continuity, or the organization of the earlier direct examination. The Government created this issue when it decided to pick-and-choose certain parts of the testimony. The District Court failed to exercise its discretion by flat-out denying the request to consider the entire transcript, less the background information. As a result, it left the defendant with a choice to leave an incomplete impression of the evidence for the jury or

to take the stand. By forcing such a choice, the District Court abused its discretion and defendant was denied a fair trial.

The District Court's error in refusing to admit the complete testimony from the first trial denied defendant a fair trial. This matter should be reversed and remanded.

II.

THE DISTRICT COURT ERRED IN ENHANCING DEFENDANT'S SENTENCE UPWARD AS A RESULT OF TESTIMONY AT A PREVIOUS TRIAL

At the sentencing hearing in this case, the District Court enhanced defendant's sentence two (2) levels on the basis of Obstruction of Justice. The enhancement was based upon the determination that Glover had perjured himself at the first trial, which resulted in a hung jury.

Initially, we note that this Court will review a sentence under the guidelines under the standard of clear error regarding factual determinations and *de novo* concerning guideline interpretations. *United States v. Hubbard*, 929 F.2d 307 (7th Cir. 1991). Defendant argues that the two point enhancement of his sentence in this case was clearly erroneous. The following occurred at the sentencing hearing:

"THE COURT: I am going to decline to add two points for obstruction of justice. You may go on to discuss the perjury aspect of the case.

MR. ANDERSON: With regard to the perjury, it's the position of the United States—and we are prepared to go through the transcript line for line. In preparing for this hearing we did sit down and look at the transcript, and we found at least 39 areas in which the defendant committed specific lies based upon the jury's finding.

THE COURT: What about the fact that the first trial resulted in a hung jury? What impact does that have on the fact—and he didn't testify at the second trial? What impact does that have on the proceedings?

MR. ANDERSON: Well, I think perhaps there would have been a conviction at the first trial if he had not testified. The perjury contributed to justice not being accomplished. It's very possible that the one juror held that, based on his perjurious testimony which they believed to be true, that he did not commit the offenses.

THE COURT: Well, the broader question is, is perjury anywhere in the proceedings a matter to be taken into account? In other words, is the book closed on the first trial when you have a mistrial? That's the issue really.

MR. ANDERSON: We didn't find any case law that specifically addressed that, but I think you have to look at the entire picture. The entire picture is that there was obstruction of justice base [sic] on the perjury. That is, during his first trial he took the stand, told lies in an attempt to obstruct the process in order that the truth would not be revealed.

THE COURT: Well, there is a case called United States versus Lueddeke, 908 F.2d 230, Seventh Circuit 1990, where perjury before a grand jury was taken into account.

There is another case that comes pretty close to it, Stout versus United States, 935 F.2d 433. The defendant lied at the first trial which ended in a hung jury. Defendant later pled guilty to a lesser offense, and the judge enhanced the

sentence based on perjury at the first trial.

So I think analytically, unless you have some other cases, Mr. Murtaugh, on the point, analytically the government is on sound ground in urging the consideration of whether or not perjury occurred at the first trial.

MR. MURTAUGH: Well, I don't know how the government can stand here, your Honor, and tell your Honor that what was said in that first trial was perjurious. What they are actually asking—

THE COURT: Well, we haven't gotten to that level yet. We are going to get to that in a minute. The first question is whether or not it can be considered. My research independent of your—you gave me no cases.

There is one other case, a Second Circuit case, U.S. versus Valdez, 16 F.3d 1324, a 1994 case, where perjury of a witness was taken into account, again, in separate proceedings.

So I think the fact that it was in a separate proceeding or a mistrial does not preclude the Court from considering whether or not perjury occurred at the first trial.

I am prepared to say, based on my own independent review of the testimony of the defendant at the first trial, that perjury was presented to this jury at the first trial. I am obliged under circuit

law, the recent Briscoe case and others, to say particularly where I think the perjury occurred because you have a right to respond to it or comment on it.

I believe that the first instance and probably the most blatant instance of perjury was Mr. Glover's statement that he never directed Wolf, Webb, Burke & Campbell to purchase Coalstar stock. He clearly wrote the letter which directed them to do that. Then he described the letter as merely something call a 'pimp.' It was, I think, a blatant piece of perjury at the first trial when he was confronted with the letter and its content to so describe it, in light of all the evidence, was in my judgment clearly perjury and certainly by a preponderance of the evidence.

The second instance which I think is significant, if other instances are necessary, if Mr. Glover's testimony that the money he received from Marolda was the repayment of—he thought—the repayment of a loan that Johnson had made to Marolda and Nadell. Without regard to Johnson's testimony, of course, he testified he made no such loan, but for Mr. Glover to so describe that payment as repayment of a loan was another instance of blatant perjury.

Perhaps the third instance, although, again, I am not sure a third instance is necessary, his description of the Italian

Village luncheon in which he denied any discussion of kickbacks I think was another instance of blatant perjury.

His description of—his contradiction of the testimony of Kathy Rugendorf, who was clearly testifying here in a truthful manner, again is an instance of perjury by Mr. Glover at the first trial.

So, I find that a perjury adjustment is proper in this case. Therefore, I add two points to the two levels to the offense of kickbacks charging the defendant with receiving kickbacks that it was a part of a racketeering conspiracy.

MS. EHRLICH: Judge, is that regular two points or upward departure?

THE COURT: Two points. It will add two. Adjustment for perjury will enhance the level by wo levels, and that will produce a level 26 with respect to the kickback aspect of the case.

(Sentencing Hearing, 9/21/95, pp. 6-10.)

Section 3C1.1 provides that a sentence may be enhanced by two levels:

> "if the defendant willfully obstructed or impeded or attempted to obstruct or implied the administration of justice during an investigation, prosecution or sentencing of the instant offense."

U.S.S.G., § 3C1.l.

The District Court based its ruling upon certain specific portions of Glover's testimony at the first trial. The Court referred to certain specific portions of Glover's testimony and characterized them as perjury:

(1) Defendant's denial of directions to Wolf, Webb, Burke & Campbell to purchase Coalstar stock;

(2) The receipt of money from Marolda and Nadell with the belief that it was the repayment of a loan from Johnson;

(3) Defendant's description of his meeting with Bennett and Johnson at the Italian Village; and

(4) His contradiction of the testimony of Rugendorf.

Based upon these four instances, the Court found a perjury adjustment to be appropriate. We argue that this determination was clear error. This determination is not supported by the appropriate factual basis in the record. While Glover testified at the first trial, he did not act in any manner to impede the administration of justice by exercising his Constitutional right to testify and testifying contrary to the Government's witnesses.

District courts are prohibited from enhancing sentences merely because a jury returned a guilty verdict. *United States, v. Lozoya-Morales*, 931 F.2d 1216, 1218 (7th Cir. 1991).

In each of the circumstances cited by the District Court, the Court made a credibility determination that it did not believe the defendant's version of an event. With regard to each version of the event, Glover did no more than deny his guilt by providing his version of what occurred.

This situation is clearly distinguishable from that in a case cited by the District Court, *United States v. Stout*, 936 F.2d 423 (9th Cir. 1991). In *Stout* the defendant testified at his first trial that he was unaware that a counterfeit bill was counterfeit until he was arrested. Later, it was proven that after his arrest, he attempted to dispose of a second bill in his possession. *Stout*, unlike *Glover*, received the enhancement on the additional basis that during his detention and subsequent investigation, he attempted to conceal and destroy

evidence. Nothing in this record suggests such conduct by Glover. Thus, the District Court erred in concluding that Glover had impeded the administration of justice by denying his guilt at the first trial.

Certainly, this qualifies as a close case and one which allows the testifying defendant to have the benefit of the doubt which the guidelines give him. *United States v. Jones*, 983 F.2d 1425, 1431 (7th Cir. 1992). This record, unlike that in *Jones*, reflects no plausible evidence from which the Court can infer that Glover's testimony was necessarily perjury. The fact that Glover put the Government's case to a credibility test in the first case, does not support the determination that he lied to obstruct justice.

The specific instances listed by the trial court as perjury all relate to testimony by Glover as to an explanation of his actions (the letter and Marolda envelope), or his version of what was said in a conversation (Bennett and Rugendorf). Just because a jury convicted defendant, despite his testimony, does not support the conclusion that the jury necessarily disbelieved him.

It should be noted that Glover denied splitting money with Johnson and yet the jury convicted him. Yet the Court did not find this testimony to be perjury. Thus, no rational distinction exists between the specific instances cited by the District Court and the remainder of Glover's testimony and, under these facts, was it any more than an exercise of a constitutionally guaranteed right to take the stand and deny the allegations against Glover.

Every single Government witness that testified to illegal transactions or conversation with defendant was impeached or admittedly lied at some point during the investigation. The fact that Glover chose to dispute the testimony of these individuals does not in-and-of itself make his version of those events perjury.

The record in this case doe not support the conclusion that the specific testimony selected by the trial court was perjury, thus no basis existed to support the two point enhancement.

When the record contains insufficient evidence to support a guideline interpretation which leads to an enhancement, the matter should be remanded for re-sentencing. *United States v. Polland*, 994 F.2d 1261 (7th Cir. 1993).

As the record in this case does not support the enhancement of defendant's sentence for perjury, this matter should be reversed and remanded for re-sentencing.

CONCLUSION

For the reasons stated herein, defendant, PAUL GLOVE, respectfully requests this Honorable Court to reverse, or in the alternative, reverse and remand his conviction and sentence.

DATED this 15th day of April, 1996.

Respectfully submitted,

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Appellant, PAUL GLOVER

UNITED STATES COURT OF APPEALS,
SEVENTH CIRCUIT

No. 95-3346.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

PAUL L. GLOVER,
Defendant-Appellant.

Argued Sept. 13, 1996.
Decided Dec. 2, 1996.

Before CUDAHY, KANNE and ROVNER, Circuit Judges.

ILANA DIAMOND ROVNER, Circuit Judge.

At the close of his second jury trial, Paul L. Glover, formerly the Vice-President and General Counsel of the Chicago Truck Drivers, Helpers and Warehouse Workers Union (Independent) (CTDU or the Union), was convicted of numerous federal offenses arising from a series of investments that he arranged to be made with money from the Union's pension and health and welfare funds. Glover entered into these transactions on the Union's behalf for the purpose of obtaining kickbacks for himself and others. He was sentenced to one term of 84 months in prison and two terms of 36 months in prison for his role in these schemes, the terms set to run concurrently and to be followed by three years of supervised release. In addition, Glover was required to forfeit $325,000 to the United States and to pay the costs of his prosecution. Glover's first trial, at which he testified in his own defense, resulted in a mistrial due to the jury's inability to reach a verdict. Although Glover then chose not to take the

stand at his second trial, the district court permitted the government to introduce a select portion of the transcript of Glover's testimony from his first trial, rejecting Glover's request that essentially all of his prior testimony be admitted in order to clarify the portion that was presented to the jury. Fed.R.Evid. 106. In this appeal, Glover contends that the district judge abused his discretion in doing so, and that the judge's ruling deprived him of his right to a fair trial. Glover also assails the district judge's decision to increase his base offense level under the Sentencing Guidelines by two levels for obstruction of justice, U.S.S.G. § 3C1.1, on the ground that his testimony at his first trial was perjurious. We affirm.

I. BACKGROUND

The CTDU is a national labor union with over 5,000 members, most of whom are truck drivers, dock workers and warehouse workers residing in the Chicago area. John R. Johnson, Sr., served as its President, and Glover as its Vice-President and General Counsel during all times relevant to this case. Glover was Fund Manager of the Union's Health and Welfare Fund, as well as a member of its Board of Trustees, and was responsible for managing the Fund's day-to-day operations. Glover was not, however, authorized to make investment decisions concerning the Health and Welfare Fund's assets on his own, as such decisions were to be made only under the direction of its full Board of Trustees. The CTDU Pension Fund was also administered by a Board of Trustees, which retained two money managers to provide it with investment advice. Pension Fund investments could only be authorized by a majority vote of its Board. Johnson held the position of Fund Manager of the Pension Fund and served with Glover as one of its trustees. The American National Bank of Chicago, Illinois, was one of the two money managers of the Pension Fund entrusted with reviewing its investments. Between October 1986 and July 1987, Wolf, Webb, Burke & Campbell (Wolf, Webb) of Philadelphia,

Pennsylvania, served as the Fund's second money manager, but later resigned and was replaced in August of 1987 by M.D. Sass of New York City.

During the latter part of 1986 and early 1987, Johnson met several times with John Lelis, a commercial mortgage broker who suggested that the Union invest its funds in Coalstar Enterprises, a coal mining project in northern Indiana. Lelis sought to obtain two million dollars in investments for the project, and was willing to offer a kickback of a portion of his commission if Johnson could arrange to invest the sum. Johnson then met with Glover and told him about the arrangement, and Glover proposed that they obtain the money by convincing the Pension Fund money managers to purchase Coalstar stock. Glover first approached an investment manager at American National Bank and tried to persuade him to approve the investment, but was summarily rebuffed. Glover then arranged a meeting between himself, Lelis, Johnson, and representatives of American National Bank for the purpose of reviewing a presentation by Coalstar describing its coal mining venture in the hope of convincing them to approve the investment. American National Bank again refused, characterizing the venture as high-risk and unsuitable as an investment for the Pension Fund. At a similar meeting held the following day, Wolf, Webb reached the same conclusion. Wolf, Webb soon resigned as money manager of the Pension Fund, in part because of a letter drafted by Glover that directed Wolf, Webb to make the Coalstar investment.

At this juncture, Glover decided to raise the money for the investment by selling some of the Pension Fund's bonds, worth approximately one million dollars, that were being held by the Mid-City National Bank. Glover then drafted, and Johnson signed, a letter that directed the bank to transfer the bonds to Dean Witter Reynolds, which subsequently sold them prior to their maturity date at a loss of over $195,500 to

the Pension Fund. Glover and Johnson then invested the proceeds from the sale in Coalstar stock without advising the Pension Fund's Board of Trustees of their actions, despite the fact that all such sales and investments of Pension Fund assets had to be approved by the Board. Nor was the Board informed of the loss that had been incurred when the Pension Fund's bonds were sold before their maturity. In June and July of 1987, Lelis met three times with Johnson and gave him a total of approximately $135,000 in cash, which Johnson divided equally with Glover. Glover did not apprise his income tax preparer of the money he received in kickbacks, and failed to report the income on his federal income tax return.

In late 1986, Johnson and Glover also entered into a similar scheme with Susan R. Bennett, a stock broker who met with Johnson to recommend various investments for the Union's assets. After Bennett agreed to give a portion of her commission to Johnson, Johnson and Glover met with her on several occasions to discuss possible investments for Union funds. In mid-January 1987, Johnson and Glover invested a total of approximately $1.95 million from the Union's Health and Welfare Fund in Putnam High Income Government Trust, a mutual fund, through Bennett. In early March of the same year, Johnson and Glover made an additional investment of over $4.6 million from the Fund in Kemper-Government Plus Portfolio funds, also through Bennett. Both investments were made without the knowledge or approval of the Board of Trustees of the Health and Welfare Fund. The Kemper investment required the sale of U.S. Treasury notes before their maturity, which was accomplished at Glover's direction, without a vote of the Board of Trustees. Shortly after receiving her brokerage commission from these transactions, Bennett met with Johnson at a local restaurant and gave him $30,000 in cash. Johnson shared the kickback with Glover, each taking $15,000.

In 1989, on the recommendation of an advisory association of pension fund trustees, the Board of Trustees of the Pension Fund began to consider placing approximately ten to fifteen million dollars of the Fund's money in real estate investments. Johnson then spoke with Bennett to confirm that she was still willing to pay kickbacks from the commissions she would earn by brokering the investment of Union monies. After Bennett agreed to make the kickbacks, Glover told Johnson to have Bennett arrange a presentation by several real estate investment firms to be made at a meeting of the Board of Trustees. Johnson and Glover told Bennett not to attend the meeting, and failed to advise the Board of Bennett's role in arranging the presentation or that she would be brokering the proposed transactions. The Board ultimately voted to invest five million dollars in each of two Sierra Capital funds, and five million dollars in a J.M.B. Realty fund. Although the Board authorized these investments, it was never informed that Bennett would be appointed broker of record on its behalf, or indeed that anyone would be paid a commission from the money it had allocated for the investments.

On November 1, 1989, Glover, Johnson and Bennett met for lunch at the Italian Village Restaurant in Chicago to discuss the division of Bennett's brokerage commission. At the meeting, Glover and Johnson made it clear to Bennett that she would be required to give them approximately $400,000 from the commissions she would receive for brokering the three transactions, that in the future she would only meet with Johnson in order to make the kickback payments, and that harm would come to her and her family if she ever mentioned Glover's name or told anyone of the kickback scheme. Bennett began receiving commission checks in late November 1989, and met with Johnson on several occasions to relinquish them. On or about November 29, 1989, Bennett gave Johnson two checks for $50,000 each, which she had endorsed over to Johnson, as well as $6,000 in cash. Bennett

again met with Johnson in late January 1990, and gave him three more checks totalling $150,000. All of the checks were eventually cashed at a currency exchange by Timothy Evoy, an acquaintance of Johnson's, for a fee of $2250 per check. A third meeting between Bennett and Johnson took place around February 10, 1990, during which Bennett gave Johnson a paper bag containing $60,000 in cash. A fourth meeting was arranged for the end of February, and Bennett made a final kickback payment of $90,000 in cash to Johnson. Apart from the $6,000 in cash Bennett bad paid to Johnson at their first meeting, which Johnson retained for himself, Johnson shared one-half of all the other proceeds from the kickback scheme with Glover. In other words, Glover received a total of $194,375 in kickback payments from Bennett's commissions for brokering the Union's Sierra Capital fund and J.M.B. Realty fund investments. Glover did not, of course, report this income on his federal income tax returns.

After Wolf, Webb resigned in August 1987 from its position as one of the two money managers of the Pension Fund, Glover and Johnson decided to find a replacement. At that time, Glover and Johnson were already acquainted with Ronald Marolda. Marolda met with Johnson and suggested that the Pension Fund appoint M.D. Sass of New York as its money manager. Marolda told Johnson of his plans to start a brokerage firm with a licensed broker named David Nadell, and assured Johnson that he would be willing to make kickback payments if the Pension Fund would agree to place its investments through his firm. Johnson reported this conversation to Glover, who thought they should demand a lump-sum kickback payment from Marolda for having M.D. Sass appointed as the Pension Fund's money manager. After Marolda told Johnson that this would be impossible, but that he and Nadell would agree to make kickback payments from all future commissions they received for the purchase and sale of stocks and bonds on behalf of the Pension Fund and

other investors holding accounts with M.D. Sass, Glover agreed to the arrangement. By the end of August 1987, the Pension Fund retained M.D. Sass as its new money manager. Marolda and Nadell soon began dividing the commissions they obtained from the trades that were executed, at first by Nadell alone, and later by their brokerage firm, at the direction of M.D. Sass. Marolda then started making regular kickback payments drawn from those commissions.

Between the end of 1987 and January of 1992, Marolda made at least thirty-six kickback payments to Johnson and Glover. All of these were cash payments that Marolda usually turned over to Johnson, who then divided the money equally with Glover. For a period of approximately eight months in 1990 and 1991, Marolda did not, however, make any payments. Johnson soon retaliated by directing a representative of M.D. Sass to stop doing business with Marolda's brokerage firm. Marolda then requested a meeting with Glover and Johnson to explain why he had failed to make the kickbacks. At the meeting, which was held at a private club in downtown Chicago, Marolda asserted that he had not earned any commissions from M.D. Sass for about eight months because he had not traded on accounts held by M.D. Sass during that time. Marolda also gave a detailed description of how the commission structure at his brokerage firm worked, and how he arrived at the sum that he eventually turned over to Johnson and Glover. Glover was apparently satisfied with Marolda's explanation of the lapse. After the meeting, Marolda continued to broker transactions made on the Pension Fund's account and began paying kickbacks from his commissions exclusively to Glover, who then assumed the task of dividing the proceeds with Johnson. A total of approximately $100,000 changed hands in this scheme, with Glover's share amounting to one-half that amount. Glover again failed to report the kickback payments on his federal income tax returns.

On January 19, 1995, a federal grand jury returned a twenty-two count indictment against Glover, charging him with conspiracy to conduct the affairs of the CTDU and its Pension and Health and Welfare Funds through a pattern of racketeering activity in violation of 18 U.S.C. § 1962(d) (Count One); soliciting and receiving kickbacks relating to the investments made on behalf of these Funds in violation of 18 U.S.C. § 1954 & 2 (Counts Two through Four and Eight through Eighteen); money laundering in violation of 18 U.S.C. § 1956(a)(1)(B)(i) & 2 (Counts Five and Six); corruptly influencing and attempting to influence the testimony of a witness before the grand jury in violation of 18 U.S.C. § 1512(b)(1) & 2 (Count Seven); and filing false United States Individual Income Tax Returns for the taxable years 1988, 1989, 1990 and 1991 in violation of 26 U.S.C. § 7206(1) (Counts Nineteen through Twenty-two). The indictment also alleged that Glover's property was subject to forfeiture to the federal government because Glover had gained approximately $338,325 from his racketeering activities, and also because he had arranged for $150,000 of the proceeds from several of the kickbacks to be laundered to disguise their illegal source.

Glover's first trial began on April 17, 1995. At trial Glover testified in his own defense concerning, among other things, his role in selecting the Coalstar investment, his choice of Bennett to broker a series of investments for the Health and Welfare Fund, and his role in directing the sale of a number of bonds and federal treasury notes in the Union's portfolio before maturity. On May 8, 1995, the jury declared itself deadlocked, and the district judge ordered a mistrial. The judge then ordered Glover to be retried, and his second trial began on June 5, 1995. This time, Glover elected not to take the stand. The government nevertheless offered a portion of the transcript of Glover' s testimony from the first trial over Glover's objection. According to Glover, Federal Rule of Evidence 106 required that nearly all of his prior testimony be

entered as evidence in the second trial, or, alternatively, that the entire testimony be excluded. See Fed.R.Evid. 106. After several invitations to Glover's counsel to specify exactly which parts of the transcript of Glover's testimony should in all fairness be read to the jury, and counsel's continued insistence that essentially all be included, the district court overruled Glover's objection. On June 22, 1995, the jury returned a verdict finding Glover guilty of all but Counts Seven and Eleven through Thirteen of the indictment, which involved one instance of witness tampering and three instances of soliciting or receiving kickbacks, respectively. The jury also returned a special verdict requiring Glover to forfeit a total of $325,000 to the government. The district judge then ordered the preparation of a presentence report and set September 21, 1995 as the date for Glover's sentencing.

At Glover's sentencing hearing, the district judge determined that for purposes of calculating Glover's base offense level under the Sentencing Guidelines, the eleven counts of soliciting and receiving kickbacks, the two counts of money laundering, and the four counts of income tax evasion should each be grouped separately. *See* U.S.S.G. § 3D1.2(d). Glover's base offense level was thus set at 24. The judge then considered whether the base offense level should be increased by two points for obstruction of justice under U.S.S.G. § 3C1.1 on the ground that Glover had committed perjury during his first trial. *See* U.S.S.G. § 3C1.1, comment. (n.3(b)). After carefully reviewing the transcript of Glover's testimony from his first trial, the judge determined that Glover had perjured himself on at least four occasions. The particular examples of perjury that the judge cited were Glover's testimony that he never directed Wolf, Webb to purchase Coalstar stock, his testimony that the money he obtained from Marolda represented the repayment of a loan that Johnson had made to Marolda and Nadell, and his testimony that he never discussed kickbacks with Bennett at the Italian Village luncheon held on November I, 1989. The

judge also noted that Glover's testimony had generally contradicted that of his secretary, and that her testimony was clearly credible. (Sentencing Tr. at 8-9.) Glover's offense level was thus increased by two points to 26, and adjusted further to 28 to reflect the fact that his offenses fell into more than one group of closely related counts. *See* U.S.S.G. § 3D1.4. This offense level yielded a sentencing range of 78 to 97 months. The judge then sentenced Glover to one term of 84 months in prison on the racketeering conspiracy and money laundering counts, and two terms of 36 months in prison on the counts involving kickbacks and income tax evasion, all three terms to be served concurrently. Glover was also ordered to forfeit $325,000, and to pay $16,811.84 to the government to cover the cost of his prosecution. In addition to requiring Glover to serve a three-year term of supervised release, the judge barred Glover from becoming involved in any labor organization (other than as a simple member) for a period of thirteen years after his release. *See* 29 U.S.C. § 504.

II. DISCUSSION

Glover maintains that the district court abused its discretion in admitting into evidence a portion of the transcript of his testimony from his first trial, then denying his request to admit nearly all of that testimony for the purpose of placing it in a proper context as required by Rule 106. Glover further asserts that by allowing the jury to receive an incomplete and misleading picture of his prior testimony, the court deprived Glover of his right to a fair trial. Glover thus maintains that his conviction should be overturned. The government contends, however, that when the district court called upon Glover to specify the portions of his previous testimony that clarified or placed in context those portions submitted by the government, Glover made a strategic decision to insist that nearly all of his prior testimony be read to the jury. According to the government, there was no abuse of discretion when the judge asked Glover to indicate which parts of the transcript

should be entered into evidence, then rejected Glover's request to admit essentially the whole transcript.

Federal Rule of Evidence 106, which stems from the common law doctrine of completeness, provides:

> When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

Fed.R.Evid. 106. Under the Rule, a party against whom a fragmentary statement is introduced may demand that any other part of the statement be admitted as would be necessary to clarify or explain the portion already received, and thus to avoid any misleading impression that would be created by offering the statement outside its true context. *E.g., United States v. Haddad,* 10 F.3d 1252, 1258-59 (7th Cir. 1993); *United States v. Lewis,* 954 F.2d 1386, 1391 (7th Cir.1992); *see also* Fed.R.Evid. 106 advisory committee's note. It is thus clear from the Rule's underlying purpose that the right to have some other portion of a statement admitted as evidence contemporaneously with the portion already received is not unqualified; indeed, the proponent of the additional evidence sought to be admitted must demonstrate its relevance to the issues in the case, and must show that it clarifies or explains the portion offered by the opponent. *United States v. Sweiss,* 814 F.2d 1208, 1211 (7th Cir. 1987) (quoting *United States v. Walker,* 652 F.2d 708, 710 (7th Cir.1981)) (internal quotations omitted); *see Lewis,* 954 F.2d at 1391; *United States v. Velasco,* 953 F.2d 1467, 1474-75 (7th Cir. 1992); *United States v. LeFevour,* 798 F.2d 977, 981 (7th Cir.1986).

As we explained in *Velasco,* the test of admissibility under Rule 106 is conjunctive. Thus, once the proponent of the evidence establishes its relevance, the district court must address the second part of the test, and should do so by asking

(1) whether the additional evidence explains the evidence already admitted; (2) whether it places the admitted evidence in its proper context; (3) whether its admission will serve to avoid misleading the trier of fact; and (4) whether its admission will "insure a fair and impartial understanding of all of the evidence." *Velasco*, 953 F.2d at 1475; *see Haddad*, 10 F.3d at 1259; *Sweiss*, 814 F.2d at 1211-12. The district court is, moreover, accorded considerable discretion in determining the admissibility of the additional evidence offered under Rule 106, and its decision will not be disturbed absent an abuse of discretion. *E.g.*, *Lewis*, 954 F.2d at 1392; *Velasco*, 953 F.2d at 1475.

On June 15, 1995, during the course of Glover's retrial, the government informed both Glover and the court of its intention to introduce part of the transcript of Glover's testimony from his first trial. The following day, the government provided Glover's counsel with the specific portion of Glover's testimony that it intended to introduce, which amounted to approximately eleven pages of the transcript of Glover's cross-examination, drawn from a total of 198 pages of prior testimony. On the morning of June 19, 1995, the government presented the district judge with the excerpts from Glover's testimony from his first trial, informing the judge that it would not seek to introduce the testimony if Glover were willing to testify at the retrial. The judge asked Glover's counsel if there were portions of Glover's testimony that he wanted introduced contemporaneously with the eleven pages selected by the government. Counsel responded that the entire transcript of Glover's testimony should be admitted, lest the jury be misled by certain responses that the defense believed the government had taken out of context. At the close of the morning session, counsel reiterated his request that Glover's entire testimony be admitted.

During the afternoon session of June 20, 1995, after the government's final witness had testified, Glover's counsel

announced that Glover would not take the stand. At a sidebar conference, the government indicated that it would offer the excerpts of Glover' s testimony from the first trial and Glover objected. The following colloquy then took place:

> THE COURT: He is not going to testify. Okay. Well, then we will have to take a recess to check the parts of the transcript. Assuming they are allowed to use it, do you want parts read?
>
> [DEFENSE COUNSEL]: Our position, I guess, is in its entirety.
>
> THE COURT: You want it read in its entirety?
>
> [DEFENSE COUNSEL]: The entirety.
>
> THE COURT: That motion will be denied. If you have some specific parts of it that you want—
>
> [DEFENSE COUNSEL]: Then, Judge, whatever part they want to put in, if they are putting a name in or an investment in, then the entirety of his testimony regarding that name, his relationship to that party or investment should go in.
>
> THE COURT: You have to be more specific than that.
>
> [DEFENSE COUNSEL]: I think we should have argument on what they are offering.
>
> THE COURT: No. I told you if you want me to consider whether parts of it to [sic] clarify or explain are admissible, I will do that. But you just said to me no, you want it all read. I will give you a blanket ruling. I am not going to require them to read it all.
>
> (Retrial Tr. at 1566-67.)

The judge then called for a recess to allow Glover's attorneys to consider whether they wanted to offer specific parts of Glover's prior testimony. Counsel's suggestion that

the first thirty pages be summarized as background information and that the remaining 168 pages be read to the jury was rejected, the judge explaining that "you are entitled certainly to offer any part which you think is necessary to fully understand what [the government is] offering, but that's all." (*Id.* at 1572-73.) The trial later resumed with the government's introduction, over Glover's continued objection, of the eleven pages of Glover's prior testimony.

As this lengthy exposition clearly demonstrates, rather than acceding to the judge's request that he select the portions of his prior testimony that clarified or explained the portions offered by the government, Glover was steadfast in his insistence that the entire transcript, less thirty pages of background information, be read to the jury. In determining whether the judge abused his discretion in refusing Glover's offer, we must therefore consider whether the materials offered by Glover meet our criteria for admissibility under Rule 106. As discussed above, this requires a showing by Glover that the entire transcript is relevant to the issues in the case, and that it qualifies or explains the excerpts offered by the government. *E.g., Velasco,* 953 F.2d at 1474-75. Even at this juncture, however, Glover makes a blanket statement that a selection of pages from the transcript would have been insufficient to insure a fair appraisal of all the evidence, yet he fails to demonstrate that the entire transcript is relevant to the issues raised in this case, *see id.,* or that only the entire transcript, rather than selected portions of it, would have sufficed to qualify or explain the excerpts that were introduced by the government, *see id.* at 1475. Indeed, by citing several examples of short passages from the transcript that Glover maintains would have clarified some of the testimony introduced by the government, Glover undermines his own argument that the court abused its discretion in refusing to allow the entire transcript to be read to the jury.

Glover nevertheless contends that the judge abused his discretion in refusing to admit the entire transcript because he

allowed an impermissible consideration to enter into that decision, namely, that it would have taken a long time to read the transcript to the jury. Insofar as Glover maintains that considerations of time should play no role in a judge's decision whether to admit additional evidence under Rule 106, he is mistaken. As this court most recently explained in *Lewis,* the district court's exercise of discretion under Rule 106 would involve

> weighing . . . the adequacy of the repair work necessary to correct any potentially misleading impression caused by an incomplete presentation against the waste of time and attention and the unfairness involved in blunting the proponent's presentation of his case when everything is required to be read at one time.

Lewis, 954 F.2d at 1392 (quoting *Walker,* 652 F.2d at 713 (7th Cir. 1981), and 1 Jack B. Weinstein et al., Weinstein's Evidence para. 106[01] at 106-7 (1979)) (internal quotations omitted). As discussed above, in deciding whether additional evidence should be admitted under Rule 106, a district court must consider, among other things, whether it will "insure a fair and impartial understanding of all of the evidence" in the case. *Velasco,* 953 F.2d at 1475. The amount of time needed to present the additional evidence, although obviously not dispositive, is one factor to be weighed in determining whether faimess requires the evidence to be admitted. *See Lewis,* 954 F.2d at 1392; *Walker,* 652 F.2d at 713-14. It is thus unsurprising that, as one commentator observed, "[a] court is more likely to find that fairness requires completeness when the requesting party wants one more line read, than where he is insisting that twenty additional documents must be introduced." 21 Charles Allen Wright & Kenneth W. Graham, Jr., Federal Practice and Procedure: Evidence §5077 at 369 (1977).

Glover does, however, raise a more compelling point. He maintains that in a criminal trial, a district court should not

allow the fact that a significant amount of time would be needed to present the additional evidence to take precedence over considerations of fundamental fairness, particularly where the defendant is then confronted with the dilemma of allowing the jury to hear an incomplete picture of the evidence, or of waiving his Fifth Amendment privilege not to testify in order to correct the mistaken impression created by the incomplete evidence. *See Walker*, 652 F.2d at 713-14. Glover is correct that, in assessing whether "fairness" under Rule 106 requires the admission of additional evidence offered by a criminal defendant, a district judge should be sensitive to the defendant's right to present evidence on his own behalf, as well as his right not to testify. *See id.* (noting that defendant was powerless to remedy distorted picture of his prior testimony without relinquishing his right not to take the stand); *see also United States v. Sutton*, 801 F.2d 1346, 1369-70 (D.C. Cir. 1986) (because defendant had constitutional right not to testify, excluded portions of recorded conversation were necessary to rebut government's case, and should have been admitted). As appealing as Glover's argument may be in the abstract, however, in this case he has failed to point to any tangible evidence that he was denied a fair trial because the district judge refused to admit the entire transcript of his earlier testimony. Indeed, Glover has failed to show how the record supports the basic premise underlying his argument, namely, that the judge excluded the transcript merely because of its length, without taking into consideration the impact of that ruling on the fairness of Glover's trial. As we have already observed, Glover has not even demonstrated that the threshold criteria for Rule 106 admissibility, such as relevance, were met here. *Cf., e.g., Walker*, 652 F.2d at 710, 713 (defendant established threshold criteria for admission of proffered evidence); *Sutton*, 801 F.2d at 1369 (same). For a stronger reason, then, his claim that he was denied a fair trial because the judge wrongly excluded Rule 106 evidence proves to be wholly unfounded. We

therefore conclude that the judge did not abuse his discretion in denying Glover's request to admit the entire transcript of his testimony from his first trial into evidence at his retrial, and that the judge's ruling did not deprive Glover of his right to a fair trial.

Glover also challenges the district judge's-decision to increase his base offense level by two levels under U.S.S.G. § 3C1.1 on the ground that he perjured himself during his first trial. Glover asserts that the judge erred in applying this enhancement because his finding of perjury was not supported by an adequate factual basis in the record, and that in a "close" case, such as he maintains this to be, the application of the enhancement effectively punishes a defendant for exercising his right to testify contrary to the government's witnesses. The government contends that the district court made the required independent review of the record, and that its factual findings were amply supported by documentary evidence and by the testimony of several witnesses whom the court expressly found to be credible. As with other factual determinations under the Sentencing Guidelines, we review the district court's findings with respect to the obstruction of justice enhancement only for clear error. *United States v. Romero*, 57 F.3d 565, 573 (7th Cir. 1995); *United States v. Mounts*, 35 F.3d 1208, 1219 (7th Cir. 1994), *cert. denied*,—U.S.—, 115 S.Ct. 1366, 131 L.Ed.2d 222 (1995).

Section 3C1.1 of the Sentencing Guidelines provides for a two-level increase in base offense level where a defendant has willfully obstructed or impeded the administration of justice during the prosecution of the offense for which he is being sentenced, *see* U.S.S.G. § 3C1.1, and Application Note 3 lists perjury as one example of conduct that will support an obstruction of justice enhancement. U.S.S.G. § 3C1.1, comment. (n.3(b)). The guideline thus applies to a case where the defendant testifying under oath has provided "false

testimony at his own trial 'concerning a material matter with the willful intent to provide false testimony, rather than as a result of confusion, mistake, or faulty memory.' " *United States v. Johnson-Dix*, 54 F.3d 1295, 1311-12 (7th Cir. 1995) (quoting *United States v. Dunnigan*, 507 U.S. 87, 94, 113 S.Ct. 1111, 1116, 122 L.Ed.2d 445 (1993)). As the Supreme Court explained in *Dunnigan*, where a defendant objects to the imposition of this enhancement on the basis of his trial testimony, the district judge "must review the evidence and make independent findings necessary to establish a willful impediment to or obstruction of justice" under this definition. 507 U.S. at 95, 113 S.Ct. at 1117. In applying this standard to *Dunnigan*, the Supreme Court then determined that the district judge's imposition of the enhancement was well supported in light of "the numerous witnesses who contradicted [Dunnigan] regarding so many facts [about] which she could not have been mistaken." *Id.* at 95-96, 113 S.Ct. at 1117.

We conclude that the same reasoning applies to Glover's testimony at his first trial. In imposing the obstruction of justice enhancement for perjury, the judge made an independent review of the record and specifically referred to three examples of willfully false statements Glover bad made under oath on matters material to the charges against him. These were (1) that he never directed Wolf, Webb to purchase Coalstar stock with monies from the Pension Fund; (2) that he believed that the money he received from Marolda was merely repayment for a loan Johnson had made to Marolda; and (3) that the meeting with Johnson and Bennett at the Italian Village Restaurant involved no discussion of kickbacks. In addition, the district judge made a general finding that Glover perjured himself on a fourth occasion when he testified contrary to his secretary, Kathy Rugendorf, and that Rugendorf had clearly testified in a truthful manner. (Sentencing Tr. at 8-9.) With respect to the first three instances cited, the district judge found that documentary

evidence and testimony clearly established that Glover had directed Wolf, Webb to purchase the Coalstar stock, and that Glover's description, under oath, of the letter he wrote to Wolf, Webb as merely a "pimp" was a "blatant piece of perjury" *(Id.* at 8.) The judge further found that Glover's description of the kickbacks he received from Marolda as mere loan repayments, and his denial that kickbacks were even discussed at the Italian Village luncheon, were equally blatant instances of perjury. *(Id.* at 9.) In making these findings, the judge thus complied in every respect with the requirements of *Dunnigan;* moreover, we discern no error, clear or otherwise, in the judge's factual determinations. As in *United States v. Jones*, 983 F.2d 1425 (7th Cir. 1993), this is plainly not a case for giving Glover "the benefit of the doubt, as we would if this were a close call." *Id.* at 1431; *see* U.S.S.G. § 3Cl.1, comment. (n.1). We therefore reject Glover's challenge to the two-point enhancement of his base offense level for obstruction of justice.

III. CONCLUSION

For the reasons stated above, Glover's conviction and sentence are

AFFIRMED.

Supreme Court, U.S.
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CLERK

No. 99-8576

IN THE

Supreme Court of the United States

PAUL L. GLOVER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Whether a defendant must demonstrate a "significant" increase in his sentence to satisfy the prejudice prong of the test set out in *Strickland v. Washington*, 466 U.S. 668 (1984), for establishing ineffective assistance of counsel.

2. Whether a 2-level error in the offense level under the sentencing guidelines, resulting in the petitioner's being erroneously sentenced to an additional 6 to 21 months in prison on account of his lawyer's error, was insufficient to satisfy the "prejudice" prong of *Strickland v. Washington*, 466 U.S. 668 (1984).

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
PERTINENT CONSTITUTIONAL PROVISION	1
STATEMENT OF THE CASE	1
1. Conviction and Sentencing	1
2. Section 2255 Action	3
SUMMARY OF THE ARGUMENT	5
ARGUMENT	8
I. NEITHER *STRICKLAND v. WASHINGTON* NOR ITS PROGENY PROVIDE ANY SUPPORT FOR THE SEVENTH CIRCUIT'S REQUIREMENT OF "SIGNIFICANT" PREJUDICE	8
A. The *Strickland* Court Established the Clear Rule That The Prejudice Prong Is Satisfied Where There Is A "Reasonable Probability That, But For Counsel's Unprofessional Errors, The Result Of The Proceeding Would Have Been Different"	8

TABLE OF CONTENTS—Continued

Page

B. This Court Has Never Seen Fit To Deviate From This Prejudice Standard Set Out In *Strickland* 10

C. The Seventh Circuit's Reliance On *Lockhart v. Fretwell* As Support For Its "Significant" Prejudice Requirement Is Foreclosed By This Court's Decision Last Term In *Williams v. Taylor* 14

D. Glover's 6 To 21 Additional Months Imprisonment Caused By Counsel's Ineffective Assistance Plainly Constitutes The "Difference In Outcome" Required To Satisfy The *Strickland* Prejudice Test 19

II. THE SEVENTH CIRCUIT'S REQUIREMENT OF "SIGNIFICANT" PREJUDICE IS INCOMPATIBLE WITH THIS COURT'S MOST FUNDAMENTAL TEACHINGS REGARDING THE PROTECTIONS OF THE SIXTH AMENDMENT 20

A. The Seventh Circuit's Requirement Of "Significant" Prejudice Is Inconsistent With *Argersinger's* Holding That Any Term Of Imprisonment Implicates The Right To Counsel 20

B. The Seventh Circuit's Requirement Of "Significant" Prejudice Is Inconsistent With This Court's Jurisprudence Relating To Other Sixth Amendment Rights 24

TABLE OF CONTENTS—Continued

Page

III. TO ALLOW AN INCORRECT SENTENCE OF IMPRISONMENT TO STAND IS ANATHEMA TO THE RULE OF LAW AND CANNOT BE JUSTIFIED 27

A. The Seventh Circuit's Concerns About The Burden Of Reviewing Collateral Attacks On Incorrect Sentences Are Misplaced 27

B. Allowing Illegal Sentences To Stand Would Defeat The Purpose Of The Sentencing Guidelines And Lead To Disrespect For The Rule Of Law 31

CONCLUSION 35

TABLE OF AUTHORITIES

CASES — Page

Allen v. United States, 175 F.3d 560 (7th Cir. 1999) 27, 33
Argersinger v. Hamlin, 407 U.S. 25 (1972)..... 20-26, 28
Arrendondo v. United States, 178 F.3d 778 (6th Cir. 1999) 11
Baldwin v. New York, 399 U.S. 66 (1970)..... 21, 26
Cade v. Haley, No. 99-6052, 2000 WL 1166023 (11th Cir. August 17, 2000) 30
Cleveland v. Whipkey, 29 Ohio App. 79 (1972) 25
Codispoti v. Pennsylvania, 418 U.S. 506 (1974)... 26
Darden v. Wainwright, 477 U.S. 168 (1986)..... 12
Dickerson v. United States, 120 S. Ct. 2326 (2000)..... 28
District of Columbia v. Clawans, 300 U.S. 617 (1937)..... 25
Duncan v. Louisiana, 391 U.S. 145 (1968) 26
Durrive v. United States, 4 F.3d 548 (7th Cir. 1993) ..... *passim*
Fuentes v. Shevin, 407 U.S. 67 (1972)..... 28
Gil v. United States, 4 F. Supp. 2d 760 (N.D. Ill. 1998) 32
Hill v. Lockhart, 474 U.S. 52 (1985) 11
In re Oliver, 333 U.S. 257 (1948)..... 24
Jackson v. Leonardo, 162 F.3d 81 (2d Cir 1998) .. 19
Janvier v. United States, 793 F.2d 449 (2d Cir. 1986) 11
Kimmelman v. Morrison, 477 U.S. 365 (1986)..... 11
Koon v. United States, 518 U.S. 81 (1996)..... 32, 33
Kyles v. Whitley, 514 U.S. 419 (1995)..... 30
Landry v. Hoepfner, 840 F.2d 1201 (5th Cir. 1988) (en banc)..... 25
Lassiter v. Dep't of Social Services of Durham County, N.C., 452 U.S. 18 (1981)..... 23

TABLE OF AUTHORITIES—Continued

Page

Lockhart v. Fretwell, 506 U.S. 364 (1993).... 6, 11, 14-18
Martin v. United States, 109 F.3d 1177 (7th Cir. 1996), *cert. denied*, 522 U.S. 931 (1997)...4, 20, 28, 32
Martinez v. Court of Appeal of California, Fourth Appellate District, 120 S. Ct. 684 (2000) 23
McMann v. Richardson, 397 U.S. 759 (1970) 22
Mempa v. Rhay, 389 U.S. 128 (1967)..... 11
Nichols v. United States, 511 U.S. 738 (1994) 23
Nix v. Whiteside, 475 U.S. 157 (1986)..... 17
Penson v. Ohio, 488 U.S. 75 (1988) 13
Roe v. Flores-Ortega, 120 S. Ct. 1029 (2000)..... 11, 13
Scott v. Illinois, 440 U.S. 367 (1979)..... 7, 20, 22-24
Scott v. United States, 997 F.2d 340 (7th Cir. 1993) 29
Smith v. Murray, 477 U.S. 527 (1986)..... 11
Smith v. Robbins, 120 S. Ct. 746 (2000)..... .....9, 11, 12
Spriggs v. Collins, 993 F.2d 85 (5th Cir. 1993)..... 15, 30
Stanley v. Illinois, 405 U.S. 645 (1972)..... 28
State v. Tweedy, 209 Neb. 649 (1981) 25
Steagald v. United States, 451 U.S. 204 (1981)..... 9
Strickland v. Washington, 466 U.S. 668 (1984)..... *passim*
Strickler v. Greene, 527 U.S. 263 (1999)..... 30
United States v. Banuelos-Rodriguez, No. 96-50297, U.S. LEXIS 13691 (9th Cir. June 14, 2000) 32
United States v. Breckenridge, 93 F.3d 132 (4th Cir. 1996) 11
United States v. Cronic, 466 U.S. 648 (1984) 13
United States v. Fayette, 895 F.2d 1375 (11th Cir. 1990) 32
United States v. Ford, 88 F.3d 1350 (4th Cir.), *cert. denied*, 519 U.S. 999 (1996) 34

TABLE OF AUTHORITIES—Continued

	Page
United States v. Hanger, 991 F.2d 791 (4th Cir. 1993)	11
United States v. Hubbard, 1997 WL 639232 (N.D. Ill. Oct. 6, 1997)	33
United States v. Jackson, 921 F.2d 985 (10th Cir. 1990)	33
United States v. Kissick, 69 F.3d 1048 (10th Cir. 1995), *cert. denied*, 519 U.S. 1138 (1997)	11
United States v. Mannino, 212 F.3d 835 (3d Cir. 2000)	13
United States v. Palomba, 31 F.3d 1456 (9th Cir. 1994)	20
United States v. Paz, 1997 WL 158338 (N.D. Ill., March 31, 1997)	27, 33
United States v. Phillips, 210 F.3d 345 (5th Cir. 2000)	15
United States v. Ray, 828 F.2d 399 (7th Cir. 1987)	11
United States v. Reilley, 948 F.2d 648 (10th Cir. 1991)	24
United States v. Severson, 3 F.3d 1005 (7th Cir. 1993)	30, 31
United States v. Seyfert, 67 F.3d 544 (5th Cir. 1995)	11
United States v. Tai, 972 F. Supp. 434 (N.D. Ill. 1997)	33
United States v. Tayman, 885 F. Supp. 832 (E.D. Va. 1995)	34
United States v. Wilson, 98 F.3d 281 (7th Cir. 1996)	3, 9, 19
United States v. Wheeler, 81 F.3d 171 (9th Cir. 1996)	11

TABLE OF AUTHORITIES—Continued

	Page
Williams v. Taylor, 163 F.3d 860 (4th Cir. 1998), *rev'd*, 120 S. Ct. 1495 (2000)	16
Williams v. Taylor, 120 S. Ct. 1495 (2000)	6, 11, 14, 16-18
STATUTES	
18 U.S.C. § 1954 (2000)	1
18 U.S.C. § 1956 (2000)	2
18 U.S.C. § 1962 (2000)	1
18 U.S.C. § 3551 (2000)	29
18 U.S.C. § 3553 (2000)	29, 32
26 U.S.C. § 7206 (2000)	2
28 U.S.C. § 991 (2000)	32
28 U.S.C. § 1254 (2000)	1
28 U.S.C. § 2254 (2000)	12
28 U.S.C. § 2255 (2000)	3, 29
RULES AND REGULATIONS	
United States Sentencing Commission, *Guidelines Manual*, § 3D1.2, 3D1.4 (Nov. 1998)	2, 19, 31
52 Fed. Reg. 3920 (1987)	30
OTHER AUTHORITIES	
Breyer, *The Federal Sentencing Guidelines and the Key Compromise Upon Which They Rest*, 17 HOFSTRA L. REV. 1 (1998)	32
Junker, *The Right to Counsel in Misdemeanor Cases*, 43 WASH. L. REV. 685 (1968)	25
S. Rep. No. 96-553 (1980)	33

OPINIONS BELOW

The opinion of the court of appeals was reported at 182 F.3d 921 (7th Cir. 1999) (table) and is reproduced in the Joint Appendix at J.A. 52. The opinion of the United States District Court for the Northern District of Illinois was not published and is reproduced in the Joint Appendix at J.A. 42.

JURISDICTION

The judgment of the court of appeals was entered on July 15, 1999. A timely petition for rehearing was denied on October 7, 1999. (J.A. 55). The petition for certiorari was filed on March 6, 2000, and was granted on June 26, 2000. This Court has jurisdiction under 28 U.S.C. § 1254(1).

PERTINENT CONSTITUTIONAL PROVISION

The relevant constitutional provision is the Sixth Amendment to the United States Constitution, which provides that

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

STATEMENT OF THE CASE

1. Conviction and Sentencing

On June 22, 1995, petitioner Paul Glover was found guilty by a federal jury of one count of conspiracy in violation of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962(d); eleven counts of soliciting and receiving kickbacks in violation of 18 U.S.C. § 1954; two counts of money laundering

in violation of 18 U.S.C. § 1956(a)(1)(B)(I); and four counts of tax evasion in violation of 26 U.S.C. § 7206. (J.A. 42). His conviction arose out of his conduct in connection with a series of investments made with money from the pension and health and welfare funds of the Chicago Truck Drivers, Helpers and Warehouse Workers Union, where Mr. Glover was employed as Vice President and General Counsel.

In the Preliminary Presentence Investigation Report ("PPSI"), the United States Probation Office recommended grouping the money laundering and kickback counts pursuant to Sentencing Guidelines § 3D1.2. (J.A. 70-71). The United States filed a position paper objecting to the PPSI, including as its first argument that the money laundering and kickback offenses should not be grouped together under USSG § 3D1.2 and that Glover therefore should receive a two-level multiple count adjustment under USSG § 3D1.4. Mr. Glover's counsel filed no written response. At the sentencing hearing, the court asked petitioner's counsel to address the government's objections to the grouping of offenses. In response, counsel simply stated a few sentences reflecting his belief that "I just think [the grouping] appropriate," without any case citations or detailed reasoning. (J.A. 89). The trial court ruled for the government and ordered that the money laundering and kickback offenses be treated separately. Based on this decision, the court added two levels to Glover's offense level. (J.A. 85). The trial court then determined that Mr. Glover's total offense level was 28 and his criminal history category was level I, resulting in a guideline range of 78 to 97 months. Petitioner was sentenced to 84 months' incarceration. (J.A. 93).

Mr. Glover appealed and was represented by the same counsel who represented him at trial and sentencing. On appeal, his counsel raised two issues: (i) that the trial judge had improperly admitted certain testimony into evidence; and (ii) that the trial judge had improperly increased his offense level based on a finding that Glover had perjured himself. Counsel did not

challenge at any time during the appeal the trial court's refusal to group together the money laundering and kickback offenses. The conviction and sentence were affirmed by the Seventh Circuit in an opinion filed December 2, 1996. (J.A. 129). Mr. Glover's counsel did not seek certiorari from this Court.

2. Section 2255 Action

On November 26, 1997, Mr. Glover filed his present action to correct his sentence in the U.S. District Court for the Northern District of Illinois pursuant to 28 U.S.C. § 2255. He asserted that section 2255 relief should be granted because his former counsel was ineffective in failing to assert or pursue the grouping issue concerning his money laundering and kickback offenses. Glover's petition alleged that by failing to prepare a written response to the government's objections to the PPSI and by failing to present an oral argument at the sentencing hearing, counsel had been ineffective at the trial level in not setting forth the arguments and case law supporting the PPSI position.

Glover's petition also alleged that he received ineffective assistance of counsel on appeal because his counsel never at any time raised the grouping issue in the appellate court. Mr. Glover noted that, along with other case law calling into question the trial court's ruling on the grouping issue, the Seventh Circuit decision in *United States v. Wilson*, 98 F.3d 281, 282-84 (7th Cir. 1996), had held that money laundering offenses and mail fraud offenses should be grouped together in cases like his. The *Wilson* case was issued on October 17, 1996, while Mr. Glover's appeal was still pending before the court of appeals. (J.A. 129).

In his Section 2255 motion, Mr. Glover claimed that his counsel's ineffective assistance during sentencing and appeal had caused Glover to receive an incorrect sentence. As a result of counsel's alleged ineffectiveness, Glover's sentencing range was increased by two levels due to the separate treatment of the money laundering and kickback offenses. Mr. Glover was sen-

tenced to 84 months' incarceration based on the court's finding of an offense level of 28 and a guideline range of 78 to 97 months. Had the money laundering offenses been grouped with the kickback offenses, the total offense level would have been 26, resulting in a guideline range of 63 to 78 months. Mr. Glover asserted that, due to his counsel's deficient performance, his sentence was incorrectly extended by at least 6 months and possibly up to 21 months. (J.A. 40-41).

The federal district court dismissed petitioner's Section 2255 motion. The district court noted that "[t]he government apparently concedes that *Wilson* would be controlling as to the grouping of Glover's conspiracy, kickback, and money laundering offenses." (J.A. 44). The district court found it unnecessary, however, to consider whether counsel's performance was deficient under the first prong of the two-part test for ineffective assistance of counsel set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). (J.A. 45). The court instead ruled that Glover failed to demonstrate the requisite prejudice under the second prong of the *Strickland* test. The district judge noted that Seventh Circuit precedent required that "[w]hen, as here, the constitutional basis for relief on such a claim is ineffective assistance of counsel, the potential change in sentence must be a 'significant' amount in order to satisfy the prejudice prong of an ineffective assistance of counsel claim." (J.A. 45). Applying the Seventh Circuit's rulings in *Durrive v. United States*, 4 F.3d 548 (7th Cir. 1993), and *Martin v. United States*, 109 F.3d 1177, 1178 (7th Cir. 1996), *cert. denied*, 522 U.S. 931 (1997), the district court concluded that the Seventh Circuit had stated a *per se* rule that a change of two offense levels would not be sufficient to constitute "significant prejudice." (J.A. 46). Accordingly, the district court held that "[b]ecause the error claimed in the present case [between 6 and 21 months of additional imprisonment] did not have a significant effect on Glover's sentence, he does not state any basis for granting § 2255 relief." (J.A. 47).

The Seventh Circuit affirmed on appeal, relying on the same rationale as the lower court. The court of appeals assumed that Mr. Glover had satisfied the first prong of *Strickland* by demonstrating that counsel had performed below professional standards. (J.A. 53). The Seventh Circuit held, however, that under the test established by that court in *Durrive* and *Martin*, Mr. Glover could not demonstrate sufficient prejudice to satisfy the second prong of *Strickland*. The Seventh Circuit stated, in pertinent part:

> This court has held that only a significant increase in the sentence rises to the level of the type of prejudice that will support an ineffective assistance of counsel claim on collateral attack.
>
> At sentencing, the district court determined that Glover's adjusted offense level under the Sentencing Guidelines was 28 and his criminal history category was I, resulting in a sentencing range of 78 to 97 months in prison. The court selected a mid-point in the range, sentencing Glover to 84 months in prison. Glover alleges that, but for the errors of his counsel, his adjusted offense level would have been 26, resulting in a range of 63-78 months imprisonment. Thus, he argues, his sentence would have been 6 to 21 months lower than the 84-month sentence he received. Unfortunately for Glover, under *Martin* and *Durrive*, this potential decrease is not sufficiently significant to be cognizable on collateral attack.

(J.A. 53-54) (citations omitted).

SUMMARY OF THE ARGUMENT

In this case, defense counsel's ineffective assistance caused the petitioner to be incorrectly sentenced. There is no dispute that, under the controlling case law, the sentencing guidelines calculation for petitioner was incorrect and excessive. Yet, the Seventh Circuit held that 6 to 21 additional months in prison due to counsel's deficient performance relating to sentencing was not "sufficiently significant" to satisfy the prejudice prong

of the ineffective assistance of counsel standard. The lower court's ruling, and the "significant" prejudice test on which it is based, is inconsistent with this Court's well established precedent concerning the prejudice prong of *Strickland*. It also is contrary to this Court's teachings concerning the Sixth Amendment right to counsel and other Sixth Amendment protections. Further, the lower court's decision conflicts with sound policy and elemental concepts of justice.

In *Strickland v. Washington*, 466 U.S. 668 (1984), this Court established the standards for demonstrating ineffective assistance of counsel. The *Strickland* Court ruled that a defendant satisfies the prejudice prong of the ineffectiveness test where he shows a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. This Court has consistently adhered to *Strickland* and applied its specific language describing the prejudice test to all types of claims of ineffective assistance of counsel. In the numerous decisions since *Strickland*, this Court has never articulated any requirement for "significant" prejudice or otherwise mandated that a defendant meet a threshold for the magnitude of the harm suffered due to counsel's ineffectiveness.

The Seventh Circuit's "significant" prejudice requirement is derived from its interpretation of *Lockhart v. Fretwell*, 506 U.S. 364 (1993). The Seventh Circuit understood *Lockhart* as adding to the prejudice prong a requirement that the result be "fundamentally unfair or unreliable." The Seventh Circuit believed that a defendant could only show a "fundamentally unfair or unreliable" result by showing a "significant" increase in sentence caused by counsel's ineffective assistance. Yet, as this Court held last term in *Williams v. Taylor*, 120 S.Ct. 1495 (2000), *Lockhart* is the unusual case and will ordinarily "have no effect on the prejudice inquiry under *Strickland*." In *Williams*, the Court explicitly rejected the "erroneous view" – which underlies the Seventh Circuit's "significant" prejudice test here – "that a 'mere' difference in outcome is not sufficient to establish consti-

tutionally ineffective assistance of counsel." *Id.* at 1515. Petitioner's 6 to 21 months of additional and incorrect imprisonment caused by counsel's ineffectiveness plainly demonstrates the "difference in outcome" required by *Strickland*.

The Seventh Circuit's "significant" prejudice test also conflicts with this Court's Sixth Amendment jurisprudence. This Court has held that *any* term of imprisonment, no matter how short, implicates the constitutional right to counsel. *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *Scott v. Illinois*, 440 U.S. 367 (1979). The principles set forth in the *Argersinger* line of cases – that "no person may be deprived of his liberty who has been denied the assistance of counsel as guaranteed by the Sixth Amendment" – cannot be reconciled with the Seventh Circuit's view that an additional 6 to 21 months of imprisonment caused by counsel's deficient performance is not "significant." The Court also has found no requirement for a "significant" term of imprisonment in the application of the other Sixth Amendment protections afforded in criminal prosecutions, such as the right to a public trial, right to notice of the charges, right to confront witnesses, and right to compel testimony. In fact, even for the right to trial by jury where the length of imprisonment is considered, this Court has upheld the right to a jury trial in any prosecution for an offense with a term of imprisonment exceeding six months.

In adopting its "significant" prejudice requirement, the Seventh Circuit was plainly motivated in part by concerns about the burden habeas challenges place on the federal judiciary. Vindication of basic constitutional rights should not be denied, however, on the basis that the judicial procedures to enforce them are time consuming or expensive. Moreover, the Seventh Circuit's fears are overblown. Only a limited number of petitioners will be able to identify with specificity a particular guideline provision which was incorrectly calculated and make the required showing of a different outcome by a "reasonable probability."

The Seventh Circuit's refusal to correct erroneous sentences unless the period of undeserved imprisonment is "sufficiently significant" is bad policy and anathema to the rule of law. Upholding incorrect sentences thwarts the purposes of Congress in enacting the Sentencing Guidelines, by allowing disparities in sentences to flourish. Moreover, the Seventh Circuit's "significant" prejudice rule calls into question the judiciary's commitment to fairness. It offends core notions of justice and liberty for a judicial system to knowingly require an individual to serve undeserved time in prison.

ARGUMENT

I. NEITHER *STRICKLAND v. WASHINGTON* NOR ITS PROGENY PROVIDE ANY SUPPORT FOR THE SEVENTH CIRCUIT'S REQUIREMENT OF "SIGNIFICANT" PREJUDICE

A. The *Strickland* Court Established The Clear Rule That The Prejudice Prong Is Satisfied Where There Is A "Reasonable Probability That, But For Counsel's Unprofessional Errors, The Result Of The Proceeding Would Have Been Different"

This Court in the seminal case of *Strickland v. Washington*, *supra*, addressed the proper standards for judging a criminal defendant's contention that the Constitution requires the setting aside of his conviction or sentence because his counsel's assistance was ineffective. 466 U.S. at 671. *Strickland* involved a federal habeas petitioner who claimed that he had received ineffective assistance of counsel during his sentencing proceeding. In that case, the Court announced a rigorous two-part test to determine whether counsel's assistance was so defective that the trial "cannot be relied on as having produced a just result." *Id.* at 686. The first part of the *Strickland* test requires that a defendant "show that counsel's performance was deficient." *Id.* at 687. The second prong of *Strickland* requires that "the defendant must show that the deficient performance prejudiced the defense." *Id.*

Only the "prejudice" prong of the *Strickland* test is at issue in this case. Neither the federal district court nor the court of appeals considered the first prong of the *Strickland* test in ruling against Glover. Rather, while acknowledging that Glover's sentence was incorrect under the controlling decision of *United States v. Wilson*, 98 F.3d 281, 282-84 (7th Cir. 1996), the courts below concluded that petitioner could not satisfy the second prong of *Strickland*.[1] It is the lower court's interpretation of this second part of the *Strickland* test – by requiring that petitioner demonstrate a "significant" increase in his sentence to satisfy the prejudice prong and concluding that an incorrect sentence of an additional 6 to 21 months imprisonment is not "sufficiently significant" – which is before the Court in this case.[2]

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[1] It is well established that a court may consider the prejudice prong first and need not reach the deficient performance component. "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." *Strickland*, 466 U.S. at 697; *see also Smith v. Robbins*, 120 S. Ct 746, n.14 (2000).

[2] In opposing certiorari, the Government argued that the performance of Glover's counsel was not professionally deficient and thus Glover failed *Strickland's* first prong. United States Brief in Opposition to Petition for Writ of Certiorari, at 7-9. As petitioner demonstrated in its Reply Brief in Support of its Petition, this attack on Glover's Petition was unavailing. The federal district court and court of appeals each decided this case against Glover *solely* on the grounds that Mr. Glover could not satisfy the "significant prejudice" requirement under *Strickland's* second prong. In addition, the Government never raised the issue of the first prong of *Strickland* in the court of appeals below. It is therefore not available to the respondent in this Court. *See, e.g., Steagald v. United States*, 451 U.S. 204, 209 (1981). Moreover, Mr. Glover's original counsel's failure to bring the directly controlling authority of *Wilson*, 98 F.3d at 281, to the courts' attention plainly calls that counsel's performance into serious question. *See* Reply Brief, at 4.

The prejudice prong grew out of the *Strickland* Court's recognition that attorney errors "are as likely to be utterly harmless in a particular case as they are to be prejudicial." *Id.* at 693. Accordingly, the Court placed the burden on the defendant to show that the error of counsel "actually had an adverse effect on the defense." It is "not enough" for the defendant to show that the errors might have had "some conceivable effect on the outcome of the proceeding." *Id.* On the contrary, the *Strickland* Court directed that

> The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.

Id. at 694. In other words, "the court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors." *Id.* at 696.

Thus, the *Strickland* Court announced a prejudice test based on whether counsel's deficient performance led to a different result. As the language of the Court's opinion makes clear, the *Strickland* Court does not require the defendant to show "significant prejudice," nor does it demand that the defendant make some threshold showing concerning the magnitude of the different results caused by counsel's deficient performance.

B. This Court Has Never Seen Fit To Deviate From This Prejudice Standard Set Out In *Strickland*

The *Strickland* Court expressly held that its two-part test for ineffectiveness should apply in federal collateral proceedings, as well as on direct appeal and in motions for a new trial. *Strickland*, 466 U.S. at 698. The Court also anticipated that this test would be applied to the "infinite variety" of attorney errors. *Id.* at 693. Following its own guidance, the Court has subsequently

employed the *Strickland* standard to evaluate all types of claims of ineffective assistance of counsel by criminal defendants.[3]

When assessing the prejudice prong of a *Strickland* claim, the Court has consistently relied on the language requiring "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *See, e.g., Roe v. Flores-Ortega*, 120 S. Ct. 1029 (2000) (applying *Strickland* to claim of ineffectiveness based on counsel's failure to file notice of appeal; quoting *Strickland* "different result" test for prejudice); *Williams v. Taylor*, 120 S. Ct. 1495 (2000) (applying *Strickland* standard to claim of ineffectiveness based on counsel's failure to investigate and present substantial mitigating evidence during the capital sentencing proceeding; quoting "different result" test for prejudice); *Hill v. Lockhart*, 474 U.S. 52 (1985) (applying *Strickland* standard to claim of ineffective assistance in non-capital plea context; quoting "different result" test for prejudice); *Kimmelman v. Morrison*, 477 U.S. 365 (1986) (applying *Strickland* standard to counsel's failure to file a suppression motion; quoting "different result" test for preju-

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[3] For example, the *Strickland* test has been applied to errors of counsel on appeal, *see, e.g., Smith v. Robbins*, 120 S. Ct. 746, 764 (2000); *Smith v. Murray*, 477 U.S. 527, 535-36 (1986), as well in the noncapital plea process, *see Hill v. Lockhart*, 474 U.S. 52 (1985). In addition, every circuit court that has addressed the issue has found that *Strickland* applies to the non-capital sentencing context. *See, e.g., Arredondo v. United States*, 178 F.3d 778 (6th Cir. 1999); *United States v. Breckenridge*, 93 F.3d 132 (4th Cir. 1996); *United States v. Wheeler*, 81 F.3d 171 (9th Cir. 1996); *United States v. Kissick*, 69 F.3d 1048 (10th Cir. 1995), *cert. denied*, 519 U.S. 1138 (1997); *United States v. Seyfert*, 67 F.3d 544, 548 (5th Cir. 1995); *United States v. Hanger*, 991 F.2d 791 (4th Cir. 1993); *United States v. Ray*, 828 F.2d 399, 421 & n.25 (7th Cir. 1987); *Janvier v. United States*, 793 F.2d 449, 456 (2d Cir. 1986); *see also Mempa v. Rhay*, 389 U.S. 128 (1967) (right to effective assistance of counsel exists in non-capital sentencing context). As discussed in the next section, however, the Seventh Circuit and some other circuit courts have incorrectly applied *Strickland* in the sentencing context by misinterpreting *Lockhart v. Fretwell*, 506 U.S. at 364.

dice); *Darden v. Wainwright*, 477 U.S. 168 (1986) (applying *Strickland* standard to claim that trial counsel failed to adequately prepare the case presenting mitigating evidence; quoting "different result" test for prejudice).

The Court's recent decision in *Smith v. Robbins*, 120 S. Ct. 746 (2000), is instructive. There, Robbins filed a federal habeas corpus petition pursuant to 28 U.S.C. § 2254 attacking his conviction for second degree murder in California state court. He claimed, *inter alia*, that his appellate counsel had rendered ineffective assistance in failing to file an appeals brief, thereby waiving two meritorious arguments. Because the issue of his counsel's performance on appeal had not been addressed by the courts below, the *Robbins* Court remanded to the lower courts, stating:

> On remand, the proper standard for evaluating Robbins's claim that appellate counsel was ineffective in neglecting to file a merits brief is that enunciated in *Strickland v. Washington*, 466 U.S. 668 (1984). . . . If Robbins succeeds in [his deficient performance] showing, he then has the burden of demonstrating prejudice. That is, he must show a reasonable probability that, but for his counsel's unreasonable failure to file a merits brief, he would have prevailed on his appeal. *See* 466 U.S. at 694 (defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different").

120 S. Ct. at 764. There is no mention of demonstrating "significant" prejudice or that any other showing is required to satisfy the prejudice prong of *Strickland*.[4] Furthermore, it is hard to imagine how the length of the imprisonment at issue could be

[4] The *Smith v. Robbins* opinion also makes no mention of *Lockhart* or any requirement that petitioner show that the result of the proceeding at issue was fundamentally unfair or unreliable. *See infra*, Section I.C.

relevant to determining whether petitioner would have prevailed on appeal.[5]

Moreover, the prejudice issue which the Court went on to address in *Robbins* was whether Robbins was required to show *any* actual prejudice. *Robbins*, 120 S. Ct. at 764. *Robbins* is thus typical of numerous decisions discussing *Strickland* prejudice; rather than requiring *significant* prejudice as the Seventh Circuit proposes, the principal inquiry often is whether the criminal defendant should be required to show *any* actual prejudice or whether prejudice can be presumed. *See, e.g., Roe v. Flores-Ortega*, 120 S. Ct. at 1037 (issue was "whether we require the defendant to show actual prejudice. . . or whether we instead presume prejudice"); *Penson v. Ohio*, 488 U.S. 75 (1988) (same); *United States v. Cronic*, 466 U.S. 648, 659 (1984) (same). This is a dramatically different inquiry and a far cry from the showing of "significant" actual prejudice urged by the Seventh Circuit here.

This Court has never articulated any requirement for "significant" prejudice or otherwise mandated that the defendant meet some threshold for the degree to which counsel's deficient performance injured the defendant. Rather, this Court has understood in all cases that, if there is a reasonable probability that counsel's unprofessional conduct had any harmful impact on the outcome of the proceeding, the defendant's Sixth Amendment right to counsel has been violated.

[5] In the case of such an error on appeal, the usual result is a remand to the district court for further proceedings which may or may not result in a more favorable ultimate sentence for petitioner. *See, e.g., United States v. Mannino*, 212 F.3d 835, 844 (3d Cir. 2000) ("The test for prejudice under *Strickland* is not whether petitioners would likely prevail upon remand, but whether we would have likely reversed and ordered a remand had the issue been raised on direct appeal.").

C. The Seventh Circuit's Reliance On *Lockhart v. Fretwell* As Support For Its "Significant" Prejudice Requirement Is Foreclosed By This Court's Decision Last Term In *Williams v. Taylor*

The Seventh Circuit announced its "significant" prejudice test in *Durrive v. United States*, 4 F.3d 548 (7th Cir. 1993), a case, like petitioner's, involving a claim of ineffective assistance of counsel relating to the federal sentencing guidelines determination. In formulating the test, the *Durrive* court relied heavily on its reading of this Court's decision in *Lockhart v. Fretwell*, 506 U.S. 364 (1993). As the ruling last term in *Williams v. Taylor*, 120 S. Ct. 1495 (2000), made clear, that reliance was entirely misplaced.

The *Lockhart* Court considered whether defendant Fretwell could show ineffective assistance of counsel based on his attorney's failure during a capital sentencing hearing to invoke a circuit court decision that was later overturned. Fretwell contended that if counsel had made a timely objection, the trial court would have been compelled to follow then-controlling, but subsequently invalidated, Eighth Circuit law. Under the more favorable precedent, Fretwell would have been sentenced to life imprisonment rather than death. Ruling against Fretwell, the *Lockhart* Court reasoned that:

> an analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective. To set aside a conviction or sentence solely because the outcome would have been different but for counsel's error may grant the defendant a windfall to which the law does not entitle him.

506 U.S. at 369-70.

Seizing on this language, the Seventh Circuit interpreted *Lockhart* as mandating an inquiry under *Strickland's* "prejudice" prong into whether the ultimate result of the proceeding at issue was "fundamentally unfair or unreliable." *Durrive*, 4 F.3d at 551. The circuit court opined that in the absence of "[g]rave

errors by judge and counsel," misapplication of the federal Sentencing Guidelines does not make the sentence "unreliable or . . . fundamentally unfair." *Id.* Without giving any precise formulation, the Seventh Circuit concluded that only an error having a "significant" impact on the defendant's sentence could be condemned as unfair or unreliable.[6] Unfortunately for Durrive and petitioner, the court considered sentencing guidelines errors of 'only' two offense levels (or between 12 to 33 additional months imprisonment for Durrive and 6 to 21 months for petitioner) insufficient to render the sentence "fundamentally unfair." *Durrive*, 4 F.3d at 551.

> An extra year in custody is significant from the defendant's perspective. But the difference between 120 months and 108 or even 98 . . . does not demonstrate that the actual sentence is "unreliable . . . or fundamentally unfair"— [it] is not . . . a "significant" difference. . . . [W]e therefore conclude that Durrive has not established "prejudice" within the meaning of *Strickland*.

Id.[7]

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[6] The Seventh Circuit borrowed the "significant" impact formulation from *Spriggs v. Collins*, 993 F.2d 85 (5th Cir. 1993). In *Spriggs*, the Fifth Circuit held that when considering claims of ineffectiveness at a state sentencing hearing, the federal reviewing court "must determine whether there is a reasonable probability" that absent counsel's unprofessional errors the defendant's sentence "would have been *significantly* less harsh." *Id.* at 88 (emphasis in original). The *Spriggs* opinion, however, cites no Supreme Court authority for its decision to modify the *Strickland* test. Furthermore, *Spriggs* was concerned about the broad latitude and discretion given state court judges in sentencing and the possibility that any small error might satisfy the *Strickland* test by arguably affecting the result at sentencing. This concern reflects a misunderstanding of the "reasonable probability" standard of *Strickland*, and in any event the problem is far removed from the application of the highly structured federal sentencing guidelines. *See United States v. Phillips*, 210 F.3d 345, 350-52 (5th Cir. 2000).

[7] The Seventh Circuit's erroneous interpretation of *Lockhart* as requiring a showing that counsel's incompetence rendered a proceeding "fundamentally

In *Williams v. Taylor*, 120 S. Ct. 1495 (2000), this Court considered and definitively rejected a nearly identical interpretation of *Lockhart*. As in *Durrive* and petitioner's case, the lower court in *Williams* denied the defendant's habeas petition, even though it acknowledged a reasonable probability that counsel's incompetence at the sentencing hearing resulted in an increased sentence. *Williams v. Taylor*, 163 F.3d 860, 867-69 (4th Cir. 1998), *rev'd*, 120 S. Ct. 1495 (2000). Relying on *Lockhart*, the lower court opined that it was not enough that "the outcome would have been different but for counsel's error." *Id.* at 867. The Fourth Circuit, like the Seventh Circuit, interpreted *Lockhart* as requiring that a defendant claiming ineffective assistance of counsel show that the result was "fundamentally unfair or unreliable." *Id.* at 869.[8]

This Court granted certiorari and reversed the denial of habeas relief. The *Williams* Court made clear that *Lockhart* did not modify or supplant the simple prejudice standard set forth in *Strickland*.[9] The Court reiterated that the "correct standard" is

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unfair or unreliable" might logically be applied to all claims of ineffective assistance of counsel on direct as well as collateral review. Thus far, however, the circuit court has reserved the new test for claims of sentencing errors presented on collateral review.

[8] According to the court of appeals:

> As the *Lockhart* majority made clear, the requirement that a criminal defendant alleging prejudice show that the result of the proceeding was unfair or unreliable was the rule, not the exception.
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> * * *
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> The holding in *Lockhart* – that a criminal defendant must show that counsel's performance rendered the proceeding fundamentally unfair or unreliable to establish prejudice – is not limited to the 'unusual' case.

Williams v. Taylor, 163 F.3d at 869.

[9] Even the dissent in *Williams* concurred in this interpretation of *Lockhart*. *See Williams*, 120 S. Ct. at 1525 (Rehnquist, C.J., dissenting).

the *Strickland* requirement that the defendant show that "but for counsel's unprofessional errors, the result . . . would have been different." *Williams*, 120 S. Ct. at 1502 (quoting *Strickland*, 466 U.S. at 694).

Lockhart, the *Williams* Court explained, describes an exceedingly narrow exception to the ordinary prejudice rule. The denial of relief in *Lockhart* reflected the highly unusual facts of the case. While a competent performance by defense counsel would have led to a different result, it was for an improper reason – counsel would have been relying on a decision which was subsequently discredited and overruled. Under these extraordinary circumstances, the *Lockhart* Court had considered it "unjust to characterize the likelihood of a different outcome as *legitimate* 'prejudice.'" *Williams*, 120 S. Ct. at 1512 (emphasis added).[10]

Turning to the more usual circumstances presented by *Williams*, the Court emphasized that "the *Strickland* test provides sufficient guidance for resolving virtually all ineffective-assistance-of-counsel claims." *Id.* at 1512. The *Williams* Court expressly adopted Justice O'Connor's concurring opinion in *Lockhart* which stressed this precise point:

> I write separately only to point out that today's decision will, in the vast majority of cases, have no effect on the prejudice inquiry under *Strickland v. Washington*, 466 U.S. 668 (1984). The determinative question – whether there is a reasonable probability that, but for counsel's unprofessional errors the result would have been different, *id.*, at

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[10] The Court considered counsel's failure to take advantage of a subsequently invalidated decision as most closely analogous to *Nix v. Whiteside*, 475 U.S. 157 (1986). *Williams*, 120 S. Ct. at 1512-13. The *Nix* Court refused to find prejudice in counsel's interference with the petitioner's intended perjury. *Nix*, 475 U.S. at 175-76. Much like Nix's attempt to use perjured testimony, Fretwell sought an unwarranted "windfall" since he was attempting to rely on counsel's failure to raise case law which was later invalidated. *Williams*, 120 S. Ct. at 1512.

> 694 – remains unchanged. This case, however, covers the unusual circumstance where the defendant attempts to demonstrate prejudice based on considerations that, as a matter of law, ought not inform the inquiry.

Williams, 120 S. Ct. at n.18 (quoting *Lockhart*, 506 U.S. at 373).[11] The Court unambiguously rejected the view that the *Strickland* prejudice test should have a magnitude threshold, chiding the lower court for "its erroneous view that a 'mere' difference in outcome is not sufficient to establish constitutionally ineffective assistance of counsel." *Williams*, 120 S. Ct. at 1515.

Plainly, the Seventh Circuit's "significant prejudice" test is inconsistent with this Court's conclusion that a "'mere' difference in outcome" establishes prejudice under *Strickland*. Accordingly, the Seventh Circuit's requirement of a "significant" increase in sentence cannot survive this Court's ruling in *Williams*.

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[11] Justice O'Connor further explained in *Lockhart* that

> the court making the prejudice determination may not consider the effect of an objection it knows to be wholly meritless under current governing law, even if the objection might have been considered meritorious at the time of the omission. That narrow holding, of course, precisely disposes of this case as it appeared before the Eighth Circuit.
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> * * *
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> [T]he impact of advocating a decidedly incorrect point of law, like the influence of perjured testimony, is not a proper consideration when assessing the likelihood of a result more favorable to the defendant. *Strickland*, *supra*, 466 U.S. at 695.

Lockhart, 113 S. Ct. at 845.

D. Glover's 6 To 21 Additional Months Imprisonment Caused By Counsel's Ineffective Assistance Plainly Constitutes The "Difference In Outcome" Required To Satisfy The *Strickland* Prejudice Test

Paul Glover plainly satisfies the prejudice standard set forth in *Strickland*. In Mr. Glover's case, the "mere difference in outcome" is 6 to 21 months of additional imprisonment. By failing to urge grouping of petitioner's money laundering offenses with his conspiracy and kickback offenses under USSG § 3D1.2, and by failing to bring the controlling decision of *United States v. Wilson*, 98 F.3d 281, 282-84 (7th Cir. 1996), to the attention of the court of appeals, his counsel's deficient performance caused Mr. Glover to receive an incorrect sentence. While Mr. Glover was sentenced to a term in prison of 84 months, he would have been properly sentenced in the guideline range of 63 to 78 months had his counsel not acted below the professional minimum in connection with the sentencing guidelines. Mr. Glover can clearly show that, "but for [his] counsel's unprofessional errors, the result of the proceeding would have been different" – he would have received a sentence that was at least 6 months (and up to 21 months) shorter.

The district court and appeals court assumed that Mr. Glover could demonstrate that "but for counsel's unprofessional errors," he would have received a different sentence. The lower courts' decisions turn solely on whether this 6 to 21 month difference in sentence constitutes the "significant" prejudice required by the Seventh Circuit. Absent the requirement of a "significant" increase in sentence added by the Seventh Circuit in contravention of the teachings of this Court, the difference in Mr. Glover's sentence of 6 to 21 additional months in prison plainly satisfies the *Strickland* prejudice test. *See also Jackson v. Leonardo*, 162 F.3d 81 (2d Cir. 1998) (even though there was no actual effect on petitioner's sentence, the possibility in the future of an enhanced sentence under repeat offender statutes

constituted sufficient prejudice under *Strickland*); *United States v. Palomba*, 31 F.3d 1456 (9th Cir. 1994) (similar).[12]

II. THE SEVENTH CIRCUIT'S REQUIREMENT OF "SIGNIFICANT" PREJUDICE IS INCOMPATIBLE WITH THIS COURT'S MOST FUNDAMENTAL TEACHINGS REGARDING THE PROTECTIONS OF THE SIXTH AMENDMENT

A. The Seventh Circuit's Requirement Of "Significant" Prejudice Is Inconsistent With *Argersinger's* Holding That Any Term Of Imprisonment Implicates The Right To Counsel

Strickland and other cases addressing ineffective assistance of counsel claims grow out of this Court's right to counsel jurisprudence. It is black letter law that the constitutional right to counsel under the Sixth Amendment is implicated by *any* term of imprisonment, no matter how short. *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *Scott v. Illinois*, 440 U.S. 367 (1979). The Seventh Circuit's "significant" prejudice test, which is not satisfied by 6 to 21 months additional imprisonment caused by coun-

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[12] Even under the Seventh Circuit's erroneous interpretation of *Lockhart*, it is hard to comprehend how 6 to 21 undeserved months in prison could *not* be considered "fundamentally unfair or unreliable." There is no basis for assuming that only "significant" terms of undeserved imprisonment are "fundamentally unfair or unreliable." As one judge noted:

> Nowhere does *Lockhart* suggest that a sentencing may still be described as fair and reliable when it is clear that the sentencing court has sentenced the petitioner to an excessive term, and only his attorney's ineffectiveness has prevented correction of the error either in the district court or on direct appeal. Nothing in *Lockhart* remotely suggests that only when an attorney's ineffectiveness results in a 'significantly' harsher sentence may the prejudice be recognized on collateral review.

Martin v. United States, 109 F.3d 1177, 1182-83 (7th Cir. 1996) (Rovner, J., dissenting from denial of en banc review), *cert. denied*, 522 U.S. 931 (1997).

sel's ineffective assistance, cannot be reconciled with this well-settled Supreme Court authority.

In *Argersinger*, this Court found no merit to the argument that a few months imprisonment is 'insignificant' for the purposes of a defendant's constitutional right to effective counsel. This was the precise issue before the Court in that case. There, Argersinger had been unrepresented by counsel in connection with a misdemeanor offense which had a maximum punishment of six months imprisonment. He had been convicted and sentenced to serve 90 days in prison. Argersinger challenged the conviction on the grounds that his Sixth Amendment right to counsel had been violated. In response, the State argued that a defendant had no right to counsel for trials of misdemeanors where the punishment imposed on the defendant was less than six months imprisonment.

The *Argersinger* Court unanimously reversed the conviction, holding that petitioner was entitled to counsel in any case resulting in imprisonment. The Court rejected the contention that "prosecutions for crimes punishable by imprisonment for less than six months may . . . be tried without a lawyer." 407 U.S. at 30-31. The *Argersinger* Court found no historical support for such a position. In addition, it considered such a rule to be contrary to the critical importance of the role of counsel: "[t]he assistance of counsel is often a requisite to the very existence of a fair trial." *Id.* The right to counsel had "relevance to any criminal trial, where an accused is deprived of liberty." *Id.* at 32. Unlike the Seventh Circuit here, the Supreme Court in *Argersinger* saw no reason to differentiate based on the length of the term of imprisonment. As the Court noted, "the prospect of imprisonment for however short a time will seldom be viewed by the accused as a trivial or 'petty' matter and may well result in quite serious repercussions. . ." *Id.* (quoting *Baldwin v. New York*, 399 U.S. 66, 73 (1970). Accordingly, the *Argersinger* Court held:

> We hold, therefore, that absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor or felony, unless he was represented by counsel at his trial.
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> * * *
>
> [N]o person may be deprived of his liberty who has been denied the assistance of counsel as guaranteed by the Sixth Amendment. This holding is applicable to all criminal prosecutions, including prosecutions for violations of municipal ordinances. The denial of the assistance of counsel will preclude the imposition of a jail sentence.

Argersinger, 407 U.S. at 37 (internal quotations and citations omitted).[13]

This Court again emphasized the special nature of imprisonment in *Scott*. *Scott* addressed a defendant who was ultimately fined and not imprisoned. The defendant argued that he was entitled to the assistance of appointed counsel because he was subject to a possible jail term of one year under the applicable statute. The *Scott* Court disagreed, while reaffirming its

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[13] *Argersinger* considered a situation in which the defendant was denied counsel, whereas petitioner here was represented by ineffective counsel. Drawing a distinction between these two cases would make a mockery of this Court's recognition that "the right to counsel is the right to the *effective assistance* of counsel." *McMann v. Richardson*, 397 U.S. 759, 771, n.14 (1970) (emphasis added). A defendant who faces the prosecutor represented by incompetent counsel is injured just as surely as a defendant who is given no counsel at all, because both defendants are unconstitutionally hindered in their efforts to present a vigorous defense. As the *Strickland* Court explained, the "Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney . . . who plays the role necessary to ensure that the trial is fair." *Strickland*, 466 U.S. at 685. Accordingly, having "a person who happens to be a lawyer . . . present at trial alongside the accused . . . is not enough to satisfy the [Sixth Amendment]." *Id.*

Argersinger decision and stressing the prejudicial nature of actual imprisonment to a defendant.

> [W]e believe that the central premise of *Argersinger* – that actual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment – is eminently sound and warrants adoption of actual imprisonment as the line defining the constitutional right to appointment of counsel.

Scott, 440 U.S. at 373.[14]

The Seventh Circuit test before the Court here would allow an additional term of imprisonment of 6 to 21 months because of counsel's ineffective assistance. Yet in *Argersinger* and *Scott*, this Court ruled that the Sixth Amendment would not tolerate *any* deprivation of liberty without effective counsel available to assist the defendant.[15] This Court unambiguously held that *any*

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[14] Writing for the Court, Chief Justice Rehnquist noted:

> the [*Argersinger*] Court's conclusion [was] that incarceration was so severe a sanction that it should not be imposed as a result of a criminal trial unless an indigent defendant had been offered appointed counsel to assist in his defense, regardless of the cost to the States implicit in such a rule. The Court in its opinion repeatedly referred to trials "where an accused is deprived of his liberty" *id.* at 32, and to "a case that actually leads to imprisonment even for a brief period," *id.* at 33. The Chief Justice in his opinion concurring in the result also observed that "any deprivation of liberty is a serious matter." Id. at 41.

Scott, 440 U.S. at 372-73 (citations omitted).

[15] The Supreme Court has confirmed the continued vitality of *Argersinger* and *Scott* on numerous occasions. *See Martinez v. Court of Appeal of California, Fourth Appellate District*, 120 S. Ct. 684, 687 (2000) (citing *Argersinger* for the proposition that "The Sixth and Fourteenth Amendments of our Constitution guarantee that a person brought to trial in any state or federal court must be afforded the right to the assistance of counsel before he can be validly convicted and punished by imprisonment."); *Nichols v. United States*, 511 U.S. 738 (1994) ("We adhere to that [*Scott*] holding today" and follow the "logical consequence of the holding"); *Lassiter v. Dep't of Social*

imprisonment implicated the protections of the Sixth Amendment's right to counsel. The well established Sixth Amendment principles in *Argersinger* and *Scott* directly contradict the Seventh Circuit's "significant" prejudice test for evaluating ineffective assistance of counsel claims.

B. The Seventh Circuit's Requirement Of "Significant" Prejudice Is Inconsistent With This Court's Jurisprudence Relating To Other Sixth Amendment Rights

The Sixth Amendment provides a defendant with certain specified protections in "all criminal prosecutions." U.S. CONST., amend. VI. The defendant's right "to have the assistance of counsel for his defence" is only one of the rights guaranteed by the Sixth Amendment. *Id.* Other rights enumerated in the Sixth Amendment include the right to a public trial, right to have notice of the state's accusations, right to confrontation, right to call witnesses, and right to a jury trial. The Seventh Circuit's ruling in this case – that 6 to 21 additional months imprisonment is not sufficiently "significant" to warrant habeas relief – clashes with this Court's approach to these various rights under the Sixth Amendment.

In applying these other Sixth Amendment rights, this Court has not concerned itself with whether the magnitude of the term of imprisonment faced by the defendant was "significant." For example, defendants are entitled to the "public trial" conferred by the Sixth Amendment irrespective of the severity of the penalty imposed. *See, e.g., In re Oliver*, 333 U.S. 257 (1948) (right

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Services of Durham County, N.C., 452 U.S. 18, 25 (1981) (*Argersinger* "established that counsel must be provided before any indigent may be sentenced to prison, even where the crime is petty and the prison term brief."); *see also United States v. Reilley*, 948 F.2d 648, 654 (10th Cir. 1991) (applying *Argersinger* and *Scott* to strike conditionally suspended sentence of imprisonment).

to public trial found applicable to state proceeding even though penalty was only a 60-day sentence). The Court also has set aside a conviction of a "petty" offense punishable by imprisonment for not more than 90 days because the trial court improperly restricted the right of cross-examination guaranteed by the Sixth Amendment. *District of Columbia v. Clawans*, 300 U.S. 617 (1937). The fact that the defendant faced a "petty offense" with short terms of imprisonment was not relevant to the Court's determination of whether these Sixth Amendment rights applied. As the Court noted, "It is simply not arguable, nor has any court ever held, that the trial of a petty offense may be held in secret, or without notice to the accused of the charges, or that in such cases the defendant has no right to confront his accusers or to compel the attendance of witnesses in his own behalf." *Argersinger*, 407 U.S. at 28 (quoting with approval, Junker, *The Right to Counsel in Misdemeamor Cases*, 43 WASH.L.REV. 685, 705 (1968)).[16]

The right to trial by jury is the only Sixth Amendment protection which has attached any weight to the length of the defen-

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[16] *See also Landry v. Hoepfner*, 840 F.2d 1206 (5th Cir. 1988) (en banc) ("the fact that an offense is 'petty' for these purposes does not mean that in a prosecution for it the accused is not entitled to the other constitutional protections, including those in the Sixth Amendment, afforded the criminal defendant."); *State v. Tweedy*, 209 Neb. 649, 655 (1981) ("[N]o defendant may be imprisoned for any offense, whether a traffic infraction, misdemeanor, or felony, absent a knowing and intelligent waiver of . . . the right to assistance of counsel, the right to confront witnesses against them, the right to a jury trial where otherwise authorized, and the privilege against self-incrimination."); *City of Cleveland v. Whipkey*, 29 Ohio App. 2d 79, 85 (1972) ("It is our holding that under the Fifth and Sixth Amendments of the United States Constitution a defendant in a misdemeanor case is entitled to be advised by the trial court of his rights and privileges, including the privilege against self-incrimination, right to trial by jury in all but petty crimes, right to be informed of the nature of the charge against him, right to confront witnesses against him and the right to the assistance of counsel for his defense.").

dant's possible sentence. In a series of cases, this Court concluded that the right to a jury trial is guaranteed by the Sixth Amendment for any offense where the potential punishment is imprisonment of six months or more. *See, e.g., Baldwin v. New York*, 399 U.S. 66 (1970); *Duncan v. Louisiana*, 391 U.S. 145 (1968).[17] This limitation on the trial by jury is grounded in the historical genesis of this right, with "petty offenses" historically tried to a judge and trial by jury historically limited to "serious" as opposed to "petty" criminal offenses. As the controlling opinion of Justice White stated in *Baldwin*, "no offense can be deemed 'petty' for purposes of the right to trial by jury where imprisonment for more than six months is authorized." 399 U.S. at 69.

Because "the right to trial by jury has a different genealogy and is brigaded with a system of trial to a judge alone," it is not applicable to the right to counsel which is implicated by any term of imprisonment. *Argersinger*, 407 U.S. at 29; *see also id.* at 30-31 ("While there is historical support for limiting the 'deep commitment' to trial by jury to 'serious criminal cases,' there is no such support for a similar limitation on the right to assistance of counsel. . . . We reject, therefore, the premise that since prosecutions for crimes punishable by imprisonment for less than six months may be tried without a jury, they may also be tried without a lawyer."). The right to counsel at issue in this case – like the right to public trial, right to notice, right to confrontation, and right to call witnesses in one's defense guaranteed in all criminal prosecutions – applies to any deprivation of liberty by imprisonment. Nevertheless, given the Seventh Circuit's conclusion here that up to 21 months additional impris-

[17] The Supreme Court's right to jury trial "decisions have established a fixed dividing line between petty and serious offenses: those crimes carrying a sentence of more than six months are serious crimes and those carrying a sentence of six months or less are petty crimes." *Codispoti v. Pennsylvania*, 418 U.S. 506, 512 (1974).

onment was not "significant,"[18] it is telling that even the right to a trial by jury – the lone Sixth Amendment right which does look to the length of the defendant's sentence – fully applies to any period of imprisonment greater than six months.

III. TO ALLOW AN INCORRECT SENTENCE OF IMPRISONMENT TO STAND IS ANATHEMA TO THE RULE OF LAW AND CANNOT BE JUSTIFIED

For any individual to be wrongfully incarcerated is repugnant to our system of laws. Imprisonment is always a terrible thing, which must inevitably entail the degradation of the human spirit. At the core of the U.S. Constitution and our judicial system lies society's efforts to ensure that no person suffers such a punishment incorrectly in any measure. Nevertheless, while acknowledging that "an extra year in custody is significant from the defendant's perspective," *Durrive*, 4 F.3d at 551, the Seventh Circuit apparently concluded that it was not worth the courts' time and attention to correct an illegal sentence caused by ineffective counsel unless the additional time in prison reached some unspecified level of "significant" increase. To the contrary, allowing any illegal sentence to stand is intolerable and cannot be justified.

A. The Seventh Circuit's Concerns About The Burden Of Reviewing Collateral Attacks On Incorrect Sentences Are Misplaced

In explaining its rationale for the "significant" prejudice requirement, the Seventh Circuit seemed especially concerned that a failure to adopt a tougher "prejudice" standard would lead to

[18] In fact, the Seventh Circuit has held that more than 40 additional months in prison does not satisfy its "significant" prejudice standard. *See, e.g., Allen v. United States*, 175 F.3d 560 (7th Cir. 1999) (42 additional months imprisonment); *United States v. Paz*, 1997 WL 158338 (N.D. Ill., March 31, 1997) (41 additional months imprisonment).

numerous such habeas petitions being filed. The Seventh Circuit opined that "[a]lmost any error at sentencing may be recast as a challenge to counsel." *Durrive*, 4 F.3d at 550. The Seventh Circuit expressed dismay that habeas petitioners might be able to attack incorrect sentences by circumventing Seventh Circuit doctrine that precluded sentencing guidelines mistakes from being raised in habeas proceedings. *Id.* at 550-51; *see also Martin*, 109 F.3d at 1178. By requiring a "significant" increase in sentence (which it equated with more than two offense levels), the Seventh Circuit intended to "save[ ] everyone the time and aggravation [these] collateral proceeding[s]" entail. *Durrive*, 4 F.3d at 552.

These types of concerns should not sway this Court in evaluating the constitutional rights asserted by Mr. Glover. As this Court has frequently noted, adherence to the Constitution is not without its costs.[19] As an obvious example, the monetary costs required to implement *Argersinger's* holding that counsel must be afforded to indigents in misdemeanor cases were not insubstantial. *Argersinger*, 407 U.S. at 2012 & n.7 (estimating implementation will require at least 1,575 additional fulltime lawyers to represent indigent misdemeanants). This Court also has recognized that there are societal costs associated with enforcing the Fourth Amendment's rights against unreasonable search and seizure, in that guilty criminals sometimes will go free. *See Dickerson v. United States*, 120 S. Ct. 2326, 2336 (2000). Addressing habeas petitions filed by prisoners is simply another one of the burdens of our Constitution and system of laws.

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[19] As this Court noted in *Fuentes v. Shevin*, 407 U.S. 67 (1972):

> "[T]he Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy. . ."

Id. at 90 n.22 (quoting *Stanley v. Illinois*, 405 U.S. 645, 650 (1972)).

Moreover, the Seventh Circuit's concerns about a surfeit of Section 2255 motions seem overblown. It is not true that any sentencing error can be "recast" as an ineffective assistance of counsel claim. Counsel frequently will have acted in a professionally competent manner in the sentencing process, having made all the necessary objections and arguments. While the prisoner may have strong arguments that the trial and/or appeals judges erred in interpreting the sentencing guidelines in these cases, the arguments cannot be translated into challenges to counsel's effectiveness. Contrary to the Seventh Circuit's fears, the ineffectiveness of counsel claim is not infinitely mutable and is not applicable to a substantial number of cases.[20]

The Seventh Circuit also ignores the important qualification in *Strickland*'s statement of the prejudice standard that a defendant must show a "reasonable probability" that counsel's unprofessional errors caused the result to be different. *Strickland*, 466 U.S. at 693-95. The Seventh Circuit seems to assume that habeas petitioners will be able to easily overcome the "reasonable probability" hurdle. We believe such an assumption to be unwarranted. While the Seventh Circuit is correct that "almost any of counsel's actions has a potential effect on a sentence," *Durrive*, 4 F.3d at 550, this is not the standard. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694; *see also Kyles v. Whitley*, 514 U.S. 419, 434 (1995). As the *Strickland* Court stated, "It is not enough for the defendant to show that the errors

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[20] Moreover, the premise of the Seventh Circuit's concern is that habeas petitioners will use the right to counsel as a means of circumventing that circuit's prohibition on review of sentencing guidelines issues in Section 2255 petitions. *See Scott v. United States*, 997 F.2d 340, 342-43 (7th Cir. 1993). This Court, however, has never reviewed the correctness of this underlying premise, which is of questionable validity since any sentence outside the properly computed guideline range is (absent lawful departures) an illegal sentence under 18 U.S.C. §§ 3551(a) & 3553(b) and thus can be corrected under 28 U.S.C. § 2255, as the plain language of that provision states.

had some conceivable effect on the outcome of the proceeding." *Strickland*, 466 U.S. at 693. Petitioners will need to adduce specific facts and cite to relevant law to convince a court that there was a "reasonable probability" of success. Only a relatively small number of petitioners will be able to come remotely close to satisfying this standard.[21]

In addition, the nature of the Sentencing Guidelines themselves will limit the number of petitions and the time required by the courts to review these petitions. The Guidelines operate by listing a number of offense and offender characteristics and calculating a defendant's sentence based on these characteristics.[22] As a result, sentencing under the Guidelines is a highly structured, formulaic process. *See* Proposed Sentencing Guidelines for United States Courts, 52 Fed. Reg. 3920 (1987) ("Through commentary and specific guideline provisions, the Commission offers objective criteria to guide the exercise of structured discretion by the judge."); *see also United States v. Severson*, 3 F.3d 1005, 1013 (7th Cir. 1993) ("The Sentencing Guidelines brought a formulaic method to sentencing . . ."). [23]

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[21] *See, e.g., Strickler v. Greene*, 527 U.S. 263, 296 (1999) (although the petitioner adequately demonstrated that the prosecution failed to disclose exculpatory evidence, petitioner failed to show that there was a "reasonable probability that his conviction or sentence would have been different had these materials been disclosed"); *Cade v. Haley*, No. 99-6052, 2000 WL 1166023, at *3 (11th Cir. Aug. 17, 2000) (despite presenting testimony by three mental health experts and five community acquaintances, petitioner failed to show a reasonable probability of a different result).

[22] The highly structured and specific nature of the Sentencing Guidelines is in marked contrast with the "wide sentencing discretion" of the Texas' sentencing scheme which led *Spriggs v. Collins*, 993 F.2d 85, 88 (5th Cir. 1993), to adopt the "significant" prejudice requirement. Given the concreteness and specificity of the Sentencing Guidelines, there is none of the unfettered discretion that led the *Spriggs* court to worry that *Strickland* would become an "automatic rule of reversal." *Id.*

[23] "There is very little discretion for a sentencing court within the sentencing guidelines. Most all complaints regarding sentencing guidelines calculations involve specific determinations resulting in 'demonstrable enhancements.'" Brief of United States to U.S. Court of Appeals for the Seventh Circuit, Glover v. United States (February 23, 1999), at 17.

Consequently, a petitioner seeking habeas relief must identify a particular part of the guideline calculation in his case which was adversely affected by his counsel's ineffective assistance. In this case, Mr. Glover was able to point to his counsel's unprofessional error relating to the grouping of money laundering offenses with kickback offenses under Section 3D1.2 of the Sentencing Guidelines. Few petitioners will be able to identify this type of specific, detailed guidelines error. Moreover, because of the requisite specificity of the guidelines error which must be identified in a petition, a reviewing court will be able to focus on the precise issue and quickly resolve the petition.[24]

B. Allowing Illegal Sentences To Stand Would Defeat The Purpose Of The Sentencing Guidelines And Lead To Disrespect For The Rule Of Law

More importantly, petitioner believes that it is the Seventh Circuit's approach – establishing an especially tough "prejudice" test for habeas review of ineffective assistance of counsel claims relating to sentencing guidelines errors – which is poor policy. The benefits inherent in reviewing the habeas petitions of Glover and others where counsel's errors caused incorrect sentences under the guidelines far outweigh the costs in judicial "time and aggravation" cited by the *Durrive* Court. One important benefit of such a collateral review is to promote the uniformity of sentences. A chief goal of the Sentencing Guidelines was to "avoid[ ] unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct . . ." 28 U.S.C. § 991(b) (2000); *see*

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[24] Contrary to the Seventh Circuit's concerns, numerous cases also could be quickly and easily resolved based on the "deficient performance" prong of *Strickland*.

also 18 U.S.C. § 3553 (2000) ("Sentencing Reform Act of 1984 attempts to promote sentencing uniformity . . ."); *Koon v. United States*, 518 U.S. 81, 113 (1996) ("The goal of the Sentencing Guidelines is, of course, to reduce unjustified disparities . . . [and to] provide uniformity, predictability and a degree of detachment lacking in our earlier system.").[25] This goal of uniformity in sentences will be defeated if courts do not correct mistaken sentences caused by unprofessional counsel. Mr. Glover received a sentence which is outside the range established by the guidelines for individuals with similar criminal backgrounds and offenses. Under the Seventh Circuit's rule, some defendants would serve prison sentences which are many years longer than their comparable 'peers' who committed the same offenses.[26] In implementing the sentencing guidelines, courts have not been permitted to adopt sentencing practices

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[25] *See also United States v. Banuelos-Rodriguez*, No. 96-50297, U.S. LEXIS 13691 (9th Cir., June 14, 2000) (The Guidelines "sought reasonable uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders." *Id.* at *12.); *United States v. Fayette*, 895 F.2d 1375, 1381 (11th Cir. 1990) ("The Guidelines were promulgated to rationalize the sentencing process by . . . promoting 'uniformity in sentencing by narrowing the wide disparity in sentences imposed by different federal courts for similar criminal conduct by similar offenders.'"); Breyer, *The Federal Sentencing Guidelines and the Key Compromise Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 4-5 (1998) (A key Congressional purpose in enacting sentencing guidelines "was to reduce 'unjustifiably wide' sentencing disparities.").

[26] The Seventh Circuit's test leads to extreme disparities in sentences. The Seventh Circuit has concluded that an error of two or three offense levels is not "significant prejudice." *See Durrive*, 4 F.3d at 551; *Martin*, 109 F.3d at 1178; *Gil v. United States*, 4 F. Supp. 2d 760, 769 (N.D. Ill. 1998). But, in some cases, two or three offense levels can mean 89 to 112 months of additional time in prison. *See Martin*, 109 F.3d at 1183 (Rovner, J., dissenting from denial of *en banc* petition). Thus, the sentencing disparities for comparable defendants may reach eight or nine years.

which thwart Congress' intent of promoting uniformity in sentences,[27] and the same should be true here.[28]

Congress recognized that disparities in sentences corrodes public confidence in the federal judicial system.[29] Yet, even more damaging to public's respect for the legal system is the continued imprisonment of individuals beyond their correct sen-

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[27] *See Koon v. United States*, 518 U.S. 81, 98 (1996) ("Before a departure is permitted, certain aspects of the case must be found unusual enough for it to fall outside the heartland of cases in the Guideline."); *United States v. Jackson*, 921 F.2d 985, 989 (10th Cir. 1990) ("Because Congress set uniformity and proportionality as goals, a sentencing judge should depart from the Guidelines range only when necessary. . .").

[28] The Seventh Circuit also increases the likelihood of disparate and arbitrary results because of the difficulties in determining what constitutes a "significant prejudice:" It should not be surprising that the lower courts' application of the Seventh Circuit's "significant" prejudice rule has been inconsistent. *Compare, e.g., Allen v. United States*, 175 F.3d 560 (7th Cir. 1999) (42 additional months in prison; not "significant" prejudice); *United States v. Paz*, 1997 WL 158338 (N.D. Ill. March 31, 1997) (41 additional months in prison; not "significant" prejudice); *with United States v. Tai*, 972 F. Supp. 434 (N.D. Ill. 1997) (15 to 42 additional months in prison; "significant" prejudice found) ("An increase of more than 15 months in the length of a prisoner's sentence seems 'significant' to us." *Id.* at 437-38); *United States v. Hubbard*, 1997 WL 639232 (N.D. Ill. Oct. 6, 1997) (40 additional months in prison; "significant" prejudice found). As Judge Rovner wrote:

> I cannot help but believe that in the adoption of this "significant" test, we have transformed ourselves into a kind of feudal duchy, with the power to grant or deny a reprieve to wrongfully sentenced prisoners according to our own whim. This is repugnant not only to our office as appellate judges but to the Guidelines themselves, which after all were adopted to achieve greater consistency in sentencing among similar situated defendants.

Martin, 109 F.3d at 1184.

[29] "Unjustifiably high or low sentences are unfair to offenders and the public in subtle ways as well. Sentences that are disproportionate to the seriousness of the offense, whether they are too high or low, create a disrespect for the law." S. Rep. No. 96-553 (1980).

tence. "[J]ustice consists not only of convicting the guilty, but also of assigning them a lawful and just punishment." *United States v. Tayman*, 885 F. Supp. 832, 844 (E.D. Va. 1995). The judicial system has a legal and moral obligation to ensure that imprisonment is fair and to correct its mistakes when they come to its attention. Having defendants serve prison sentences longer than the period called for by the applicable statutes and regulations because of counsel's error is anathema to the rule of law. As one court noted in a different context:

> [S]entencing a defendant at the wrong guideline range seriously affects the fairness, integrity, and public reputation of the judicial proceedings. If we do not correct this error, [defendant] will serve a term of imprisonment [] longer than required by the sentencing guidelines. We cannot casually ignore this fact . . . No court of justice would require a man to serve [] undeserved years in prison when it knows that the sentence is improper.

United States v. Ford, 88 F.3d 1350, 1356 (4th Cir. 1996), *cert. denied*, 519 U.S. 1999 (1996). Similarly, "fairness, integrity and public reputation of the judicial proceedings" should compel this Court to reject the "significant" prejudice test adopted by the Seventh Circuit below and to conclude that Mr. Glover's 6 to 21 months of additional imprisonment caused by counsel's unprofessional errors satisfies the prejudice prong of *Strickland*.

CONCLUSION

For all of the foregoing reasons, the judgment of the court of appeals should be reversed.

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In the Supreme Court of the United States

PAUL L. GLOVER, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether petitioner was denied effective assistance of counsel because his lawyer did not argue that his money laundering offenses should be grouped with his labor racketeering offenses to calculate his sentencing range under the Sentencing Guidelines.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statutory and guidelines provisions involved	1
Statement	2
Summary of argument	7
Argument:	
Counsel's failure to argue that petitioner's money laundering and racketeering offenses should be grouped under the Sentencing Guidelines did not constitute ineffective assistance	11
A. *Strickland* v. *Washington* governs claims of ineffective assistance of counsel at noncapital sentencing and appeal	11
B. Counsel's failure to argue that petitioner's money laundering and racketeering offenses should be grouped was not deficient performance	24
C. Petitioner was not prejudiced by counsel's failure to raise the grouping claim	35
Conclusion	49
Appendix	1a

TABLE OF AUTHORITIES

Cases:

Allen v. *United States*, 175 F.3d 560 (7th Cir.), cert. denied, 120 S. Ct. 432 (1999)	22
Argersinger v. *Hamlin*, 407 U.S. 25 (1972)	20
Arredondo v. *United States*, 178 F.3d 778 (6th Cir. 1999)	13, 14, 23, 29
Auman v. *United States*, 67 F.3d 157 (8th Cir. 1995)	14, 17
Baldwin v. *New York*, 399 U.S. 66 (1970)	21

Cases—Continued: Page

Burns v. *United States*, 501 U.S. 129 (1991) 13
Capital Cities Cable, Inc. v. *Crisp*, 467 U.S. 691 (1984) 24
Dunham v. *Kisak*, 192 F.3d 1104 (7th Cir. 1999) 34
Durrive v. *United States*, 4 F.3d 548 (7th Cir. 1993) 5, 8, 18, 19, 20, 21
Evitts v. *Lucey*, 469 U.S. 387 (1985) 13, 20
Gideon v. *Wainwright*, 372 U.S. 335 (1963) 13
Gray v. *Greer*, 800 F.2d 644 (7th Cir. 1986) 15
Hill v. *Lockhart*, 474 U.S. 52 (1985) 11-12, 15
Hill v. *United States*, 368 U.S. 424 (1962) 8, 16
Janvier v. *United States*, 793 F.2d 449 (2d Cir. 1986) 14
Jones v. *Barnes*, 463 U.S. 745 (1983) 9, 14, 26, 27
Jones v. *United States*, 178 F.3d 790 (6th Cir.), cert. denied, 120 S. Ct. 335 (1999) 17
Kimmelman v. *Morrison*, 477 U.S. 365 (1986) 12, 23, 35, 38
Knight v. *United States*, 37 F.3d 769 (1st Cir. 1994) 17
Koon v. *United States*, 518 U.S. 81 (1996) 12, 37
Lebron v. *National R.R. Passenger Corp.*, 513 U.S. 374 (1994) 24
Lilly v. *Gilmore*, 988 F.2d 783 (7th Cir.), cert. denied, 510 U.S. 852 (1993) 29
Lockhart v. *Fretwell*, 506 U.S. 364 (1993) 8, 18, 39
Martin v. *United States*, 109 F.3d 1177 (7th Cir. 1996), cert. denied, 522 U.S. 931 (1997) 5, 6, 18, 20, 21, 22
Mempa v. *Rhay*, 389 U.S. 128 (1967) 12, 20
Michel v. *Louisiana*, 350 U.S. 91 (1955) 26
Nichols v. *United States*, 511 U.S. 738 (1994) 22
Orsini v. *Wallace*, 913 F.2d 474 (8th Cir. 1990), cert. denied, 498 U.S. 1128 (1991) 34
Parks v. *United States*, 832 F.2d 1244 (11th Cir. 1987) 17
Penson v *Ohio*, 488 U.S. 75 (1988) 13
Powell v. *Alabama*, 287 U.S. 45 (1932) 13

Cases—Continued: Page

Reece v. *United States*, 119 F.3d 1462 (11th Cir. 1997) 14
Reed v. *Farley*, 512 U.S. 339 (1994) 16
Roe v. *Flores-Ortega*, 120 S. Ct. 1029 (2000) 12, 15, 35
Scott v. *United States*, 997 F.2d 340 (7th Cir. 1993) 17
Smith v. *Murray*, 477 U.S. 527 (1986) 12, 26, 27, 29, 34
Smith v. *Robbins*, 120 S. Ct. 746 (2000) 12, 14, 15, 26, 27, 32, 35
Smullen v. *United States*, 94 F.3d 20 (1st Cir. 1996) 14
Spriggs v. *Collins*, 993 F.2d 85 (5th Cir. 1993) 20
Strickland v. *Washington*, 466 U.S. 668 (1984) ..... *passim*
Strickler v. *Greene*, 527 U.S. 263 (1999) 36
United States v. *Breckenridge*, 93 F.3d 132 (4th Cir. 1996) 14, 35
United States v. *Cusumano*, 943 F.2d 305 (3d Cir. 1991), cert. denied, 502 U.S. 1036 (1992) 30-31, 45
United States v. *Essig*, 10 F.3d 968 (3d Cir. 1993) 17
United States v. *Ford*, 918 F.2d 1343 (8th Cir. 1990) 35
United States v. *Fuente-Kolbenschlag*, 878 F.2d 1377 (11th Cir. 1989) 37
United States v. *Harper*, 972 F.2d 321 (11th Cir. 1992) 30, 40, 43
United States v. *Headley*, 923 F.2d 1079 (3d Cir. 1991) 14, 35
United States v. *Johnson*, 971 F.2d 562 (10th Cir. 1992) 30, 43-44
United States v. *Kissick*, 69 F.3d 1048 (10th Cir. 1995), cert. denied, 519 U.S. 1138 (1997) 14
United States v. *Kneeland*, 148 F.3d 6 (1st Cir. 1998) 33
United States v. *Kunzman*, 54 F.3d 1522 (10th Cir. 1995) 30, 40, 41

Cases—Continued: Page

United States v. *Lavoie*, 19 F.3d 1102 (6th Cir. 1994) 37
United States v. *Leonard*, 61 F.3d 1181 (5th Cir. 1995) 30, 31, 33
United States v. *Lombardi*, 5 F.3d 568 (1st Cir. 1993) 30, 40, 41, 42
United States v. *Lopez*, 100 F.3d 113 (10th Cir. 1996) 35
United States v. *McMahon*, 133 F.3d 918 (4th Cir. 1999) 33
United States v. *Mannino*, 212 F.3d 835 (3d Cir. 2000) 35, 37
United States v. *McClendon*, 195 F.3d 598 (11th Cir. 1999) 33
United States v. *Mikalajunas*, 186 F.3d 490 (4th Cir. 1999), cert. denied, 120 S. Ct. 1283 (2000) 17
United States v. *Mullens*, 65 F.3d 1560 (11th Cir. 1995), cert. denied, 517 U.S. 1112 (1996) 33
United States v. *Napoli*, 179 F.3d 1 (2d Cir. 1999), cert. denied, 120 S. Ct. 1176 (2000) 33, 40, 41, 43, 44, 47
United States v. *O'Kane*, 155 F.3d 969 (8th Cir. 1998) 33, 41, 43, 44, 47
United States v. *Phillips*, 210 F.3d 345 (5th Cir. 2000) 20, 29, 37
United States v. *Porter*, 909 F.2d 789 (4th Cir. 1990) 30
United States v. *Pregent*, 190 F.3d 279 (4th Cir. 1999) 17
United States v. *Schlesinger*, 49 F.3d 483 (9th Cir. 1994) 17
United States v. *Segler*, 37 F.3d 1131 (5th Cir. 1994) 17, 36
United States v. *Seyfert*, 67 F.3d 544 (5th Cir. 1995) 14, 29

Cases—Continued: Page

United States v. *Soto*, 132 F.3d 56 (D.C. Cir. 1997) 14, 35
United States v. *Talk*, 158 F.3d 1064 (10th Cir. 1998), cert. denied, 525 U.S. 1164 (1999) 17
United States v. *Taylor*, 984 F.2d 298 (9th Cir. 1993) 30, 43
United States v. *Universal Mgmt. Servs., Inc.*, 191 F.3d 750 (6th Cir. 1999), cert. denied, 120 S. Ct. 2740 (2000) 34
United States v. *Walker*, 112 F.3d 163 (4th Cir. 1997) 33
United States v. *Watts* 519 U.S. 148 (1997) 47
United States v. *Williamson*, 183 F.3d 458 (5th Cir. 1999) 35
United States v. *Wilson*:
98 F.3d 281 (7th Cir. 1996) 5, 10, 25, 31, 34, 39, 45, 47
131 F.3d 1250 (7th Cir. 1997) 31, 48
Williams v. *Taylor*, 120 S. Ct. 1495 (2000) 7, 8, 9, 12, 19, 20, 39
Williams v. *United States*, 503 U.S. 193 (1992) 13
Yee v. *City of Escondido*, 503 U.S. 519 (1992) 24

Constitution, statutes, guidelines and rules:

U.S. Const.:
Amend. IV 12, 23
Amend. VI 17
Sentencing Reform Act of 1984, Pub. L. No. 98-473, Tit. II, ch. II, 98 Stat. 1987 12
18 U.S.C. 1954 3
18 U.S.C. 1956(a)(1)(B)(i) 3
18 U.S.C. 1962(d) 2-3
18 U.S.C. 3553 ..... 16, 1a
18 U.S.C. 3553(a)(4) 16, 1a
18 U.S.C. 3553(b) 16, 2a
18 U.S.C. 3742 ..... 13, 17, 6a
18 U.S.C. 3742(e) 13, 7a

Statutes, guidelines and rules—Continued: Page

18 U.S.C. 3742(f) 14
26 U.S.C. 7206 3
28 U.S.C. 994(b)(2) 16
28 U.S.C. 2255 (1994 & Supp. IV 1998) 4, 8, 17, 18, 25, 40
United States Sentencing Guidelines:
Ch. 1:
Pt. A. 4(h) 28
Pt. B.:
§ 1B1.3(a)(2) 47, 48, 10a
Ch. 2:
Pt. B:
§ 2B1.1(b)(1) 44
Pt. E:
§ 2E1.1(a) 41
§ 2E5.1( )(1) 45
§ 2E5.1(b) 41
§ 2E5.1(b)(1) 45
§ 2E5.1.(b)(2) 44
Pt. F:
§ 2F1.1(b)(1) 44
§ 2F1.1(b)(1)(M) 45, 47
Pt. S:
§ 2S1.1(a)(2) 46
§ 2S1.1(b) 41
§ 2S1.1(b)(2) 44
§ 2S1.1(b)(2)(C) 45-46
§ 2S1.1(b)(2)(G) 47
§ 2S1.1 comment. 43
Ch. 3:
Pt. B:
§ 3B1.3 46
Pt. C:
§ 3C1.1 ..... 3, 46
Pt. D:
Pt. D, intro. comment. 39, 44, 18a

Guidelines and rules—Continued: Page

§ 3D1.2 ..... *passim*
§ 3D1.2(c) 31, 41, 12a
§ 3D1.2(d) 31, 33, 34, 38, 39, 42, 48, 12a
§ 3D1.2, comment. (n.2) 41
§ 3D1.2, comment. (n.5) 41
§ 3D1.2, comment. (n.6) 43, 44
§ 3D1.3(b) 46, 47, 14a
§ 3D1.3, comment. (n.3) 48
§ 3D1.4 ..... 3, 42, 46, 15a
Ch. 5:
Pt. B:
§ 5B1.1 22
Fed. R. Crim. P.:
Rule 32 17
Rule 32(b) 27
Miscellaneous:
Robert Jackson, *Advocacy Before the United States Supreme Court*, 25 Temple L.Q. 115 (1951) 27
S. Rep. No. 225, 98th Cong., 1st Sess. (1983) 13

In the Supreme Court of the United States

No. 99-8576

PAUL L. GLOVER, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (J.A. 52-54) is unreported, but the judgment is noted at 182 F.3d 921 (Table).

JURISDICTION

The judgment of the court of appeals was entered on July 15, 1999. A petition for rehearing was denied on October 7, 1999 (J.A. 55). On December 16, 1999, Justice Stevens extended the time for filing a petition for a writ of certiorari to and including March 5, 2000. The petition was filed on March 6, 2000 (a Monday) and was granted on June 26, 2000. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY AND GUIDELINES PROVISIONS INVOLVED

The relevant provisions of the Sentencing Reform Act of 1984 and the Sentencing Guidelines are set forth in an appendix to this brief.

STATEMENT

1. Petitioner was Vice-President and General Counsel of the Chicago Truck Drivers, Helpers, and Warehouse Workers Union. Petitioner was also Fund Manager of the Union's Health and Welfare Fund and a member of the Fund's Board of Trustees. Although petitioner was responsible for managing the Fund's day-to-day operations, he was not authorized to make investment decisions for the Fund. Those decisions were to be made only by the full Board of Trustees. The Union's Pension Fund was also administered by a Board of Trustees, and Pension Fund investments could be authorized only by a majority vote of the Pension Fund Board. John R. Johnson, Sr., the President of the Union, served as Fund Manager of the Pension Fund, and both he and petitioner were members of the Pension Fund's Board of Trustees. J.A. 130.

Between 1986 and 1992, petitioner and Johnson engaged in several schemes in which they received kickbacks in exchange for causing the Health and Welfare and Pension Funds to make various investments. Petitioner and Johnson improperly steered investments to various investment brokers without the approval of the relevant Boards, and the brokers then paid kickbacks to petitioner and Johnson. Petitioner did not report the kickbacks on his income tax returns, and he cashed some of the checks that he received through a currency exchange, conduct which formed the basis for money laundering charges against him. The laundered money was not used to further the underlying fraud. J.A. 131-135. The improper commissions that the brokers received totaled approximately $1,802,000, and the laundered funds totaled approximately $250,000. J.A. 67.

2. On January 19, 1995, petitioner was indicted in the United States District Court for the Northern District of Illinois on charges of racketeering conspiracy, in violation of the Racketeer Influenced and Corrupt Organizations Act, 18

U.S.C. 1962(d); labor racketeering, in violation of 18 U.S.C. 1954; money laundering, in violation of 18 U.S.C. 1956(a)(1)(B)(i); and filing false tax returns, in violation of 26 U.S.C. 7206. Petitioner's first trial ended in a hung jury. J.A. 136. The jury in petitioner's second trial found him guilty of most of the charges. J.A. 136-137.

The Presentence Investigation Report (PSR) that was prepared for petitioner's sentencing recommended that his labor racketeering, money laundering, and tax offenses all be grouped together under Sentencing Guidelines (Guidelines) § 3D1.2 for purposes of determining his offense level. J.A. 71. The government objected to that recommendation, and the district court considered the issue at the sentencing hearing. See J.A. 88-89. The government pointed out that several courts of appeals had held that money laundering offenses should not be grouped with the offenses that generated the laundered funds. Petitioner's counsel contended that the offenses involved "one joint effort" and all of the offenses were therefore "appropriately grouped" in the PSR. The district court, however, agreed with the government that the money laundering offenses should be grouped separately. J.A. 89.

The district court also decided, over defense counsel's objection, that petitioner's offense level for the racketeering offenses should be adjusted upward two levels for obstruction of justice under Guidelines § 3C1.1 because petitioner had perjured himself at his first trial. Sent. Tr. 6-9; J.A. 84. The government asked the district court to make an additional upward adjustment for petitioner's role in the offense (Sent. Tr. 12-13), but the court agreed with defense counsel's argument (*id.* at 13-14) that an adjustment was not warranted. As a result, the adjusted offense level for the racketeering group of offenses was 26, and the adjusted offense level for the money laundering group of offenses was also 26. The court added two levels under Guidelines § 3D1.4 because it found (in contrast to the PSR) that petitioner's

offenses fell into more than one group of closely related counts. The resulting offense level of 28, combined with petitioner's criminal history category of I, yielded a sentencing range of between 78 and 97 months of imprisonment. Sent. Tr. 15; J.A. 86. The government asked the court to sentence petitioner at the top of the range, Sent. Tr. 17, and petitioner's counsel responded by pointing out a variety of mitigating factors, including petitioner's family responsibilities, his past productive contributions to the community, and his lack of a criminal history (*id.* at 19-20). The district court imposed a sentence of 84 months. *Id.* at 23-24.

3. The same counsel represented petitioner in his direct appeal. In that appeal, petitioner raised two claims, one concerning his convictions and the other his sentence. J.A. 130. Petitioner argued that the district court had erroneously denied his request that nearly all of his testimony at his first trial be admitted in order to clarify the portion of that testimony that had been introduced by the government at the second trial. Petitioner contended that, as a result, his convictions should be overturned. J.A. 138. Petitioner also argued that the two-level enhancement that the district court had imposed on the ground that petitioner had perjured himself at his first trial was not supported by the evidence. J.A. 145. Petitioner did not renew on direct appeal his objection to the district court's refusal to group his money laundering offenses with the offenses that generated the laundered funds for purposes of determining his base offense level. In a published opinion of several pages, the court of appeals considered and rejected each of petitioner's claims and affirmed his convictions and sentence. J.A. 129-147.

4. In a later motion to correct his sentence filed under 28 U.S.C. 2255 (1994 & Supp. IV 1998), petitioner renewed the claim that his money laundering offenses should have been grouped with his conspiracy and labor racketeering offenses under Guidelines § 3D1.2. J.A. 23-34. Petitioner also argued

that his counsel had rendered constitutionally ineffective assistance under *Strickland* v. *Washington*, 466 U.S. 668 (1984). He claimed that counsel was derelict in failing to press the grouping argument adequately at sentencing and in failing to raise it at all on direct appeal, and that the deficient performance had caused him prejudice. J.A. 34-41. Under a proper application of the Guidelines, petitioner contended, his offense level should have been reduced from level 28 to 26, his Guidelines range should have been 63 to 78 months of imprisonment, and his sentence should accordingly have been between 6 and 21 months lower than the 84 months imposed by the district court. J.A. 43.

The district court denied petitioner's Section 2255 motion. J.A. 42-48. The court did not reach the government's argument, on the first component of the *Strickland* analysis, that "counsel's performance could not have been deficient, at sentencing or on appeal, for failing to raise an issue that had not yet been decided by the Seventh Circuit." J.A. 44.[1] Instead, the court resolved petitioner's ineffective assistance claim on the second component of the *Strickland* analysis, because it found that petitioner had not shown prejudice. J.A. 45. The court explained that circuit precedent required that the potential change in sentence be a "significant" amount in order to constitute prejudice, J.A. 45 (citing *Durrive* v. *United States*, 4 F.3d 548 (7th Cir. 1993), and *Martin* v. *United States*, 109 F.3d 1177 (7th Cir. 1996), cert. denied, 522 U.S. 931 (1997)), and that the increase in sen-

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[1] The district court noted that, at the time of sentencing, the Seventh Circuit had not yet considered the grouping issue that petitioner was seeking to raise, but several other circuits had rejected his position. J.A. 43-44. Only after oral argument in petitioner's appeal and before issuance of the opinion affirming his convictions and sentence did the Seventh Circuit rule in *United States* v. *Wilson*, 98 F.3d 281 (1996), that "the § 1956 money laundering offenses and mail fraud offenses involved in that case should be grouped." J.A. 44.

tence that petitioner alleged (6 to 21 months) was not "significant" enough under that test. J .A. 45-47.[2]

5. The court of appeals affirmed. J.A. 52-54. In a short per curiam opinion, the court endorsed the district court's reasoning:

> Even if we were to assume that [petitioner's] attorneys performed inadequately [under *Strickland*], the second prong, prejudice, is missing here. [Petitioner] argues that his attorneys' failure to argue the correct interpretation of U.S.S.G. § 3D1.2 led to an adjusted offense level two levels higher than it should have been. This court has held that only a significant increase in the sentence rises to the level of the type of prejudice that will support an ineffective assistance of counsel claim on collateral attack.

J.A. 53. The court acknowledged petitioner's claim that, if not for his counsel's purported errors, he would have been sentenced within a Guidelines range of 63 to 78 months, which was 6 to 21 months less than his sentence of 84 months of imprisonment. J.A. 53. Relying on *Durrive* and *Martin*, however, the court held that "this potential decrease is not sufficiently significant to be cognizable on collateral attack." J.A. 54.

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[2] The court recognized that in *Martin*, the court of appeals had described its approach to sentencing prejudice as a "rule of proportionality" but had not explicated the meaning of that phrase. J.A. 46 (quoting *Martin*, 109 F.3d at 1178). The district court therefore compared the potential change in petitioner's sentence to the change that the court of appeals in *Durrive* found insufficient to constitute prejudice. In *Durrive*, the sentence reduction would have been between 10 and 18.3% (120 months reduced by 12 to 22 months). J.A. 46-47. Here, the sentence reduction would have been between 7.1 and 25% (84 months reduced by 6 to 21 months). J.A. 47. The court concluded that "[t]he potential sentence reduction in the present case is not large enough to satisfy the significant change requirement of *Durrive* and *Martin*." J.A. 47.

SUMMARY OF ARGUMENT

In *Strickland* v. *Washington*, 466 U.S. 668 (1984), this Court held that a claim of ineffective assistance of counsel in violation of the Sixth Amendment requires two showings: first, the defendant must show that counsel committed sufficiently serious errors that his "representation fell below an objective standard of reasonableness." *Id.* at 688. Second, the defendant must show that the errors resulted in prejudice. Establishing prejudice requires the defendant to show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. Petitioner's claim is that, but for counsel's deficient performance at trial and on appeal, his sentence under the Sentencing Guidelines would have been between 6 and 21 months less than the 84 months of imprisonment he received. The court of appeals held that such a reduction is not "significant" enough to constitute prejudice. In our view, the court of appeals erred in supplementing *Strickland*'s test for prejudice with a "significant" difference inquiry. Nevertheless, a proper application of *Strickland* results in the conclusion that petitioner can show neither deficient performance nor prejudice.

A. *Strickland* itself involved capital sentencing, and the Court reserved whether its two-part test applied to the less formal process and "standardless discretion" in noncapital sentencing. 466 U.S. at 686. Subsequent cases, however, have revealed that "the *Strickland* test provides sufficient guidance for resolving virtually all ineffective-assistance-of-counsel claims." *Williams* v. *Taylor*, 120 S. Ct. 1495, 1512 (2000). It is particularly suited to evaluating counsel's role in sentencing and appeals under the federal Sentencing Guidelines, because the Guidelines provide detailed standards to guide the discretion of the court, they are applied through relatively formal adversary procedures at sentencing and on appeal, and the intricacy of the Guidelines has increased the

need for counsel in order to guarantee the defendant a fair sentencing disposition.

The unique characteristics of Guidelines sentencing should nevertheless inform application of the *Strickland* test. Non-capital sentencing, under the Guidelines as elsewhere, generally involves a wide range of possible outcomes and leaves the court with significant discretion to select a sentence. The benefits of pressing a particular claim, therefore, will often be quite uncertain to counsel; likewise, it will often be difficult for a Section 2255 court to determine the probable effect of counsel's failure to pursue the claim. In addition, Sentencing Guidelines claims are not themselves cognizable on collateral review, because an error in application of the Guidelines will rarely "inherently result[] in a complete miscarriage of justice" or be "inconsistent with the rudimentary demands of fair procedure." *Hill* v. *United States*, 368 U.S. 424, 428 (1962). The standard for ineffective assistance of counsel should not be so easy that defendants can routinely circumvent the bar on collateral review of Guidelines claims by recasting them as constitutional ones.

The court of appeals correctly sought to balance these considerations. But it erred in holding that a defendant could show "prejudice" for an ineffective assistance of counsel claim only if, but for counsel's error, the defendant would have received a "significant" sentencing reduction. See *Durrive* v. *United States*, 4 F.3d 548 (7th Cir. 1993). In fashioning that standard, the court of appeals relied on this Court's decision in *Lockhart* v. *Fretwell*, 506 U.S. 364 (1993), which it understood as modifying the *Strickland* prejudice analysis by requiring the defendant to show not only a different outcome (*i.e.*, a longer sentence), but also a fundamentally unfair or unreliable result (*i.e.*, a significantly longer sentence). But this Court recently rejected that understanding of *Lockhart*. As the Court explained in *Williams*, 120 S. Ct. at 1513, *Lockhart* "do[es] not justify a departure from a straightforward application of *Strickland* when the ineffectiveness of counsel *does* deprive the defendant of a substantive or procedural right to which the law entitles him." In that setting, no "separate inquiry into fundamental fairness" is required. 120 S. Ct. at 1513. The Seventh Circuit's "significant" difference test contradicts this Court's reasoning in *Williams*. The test has also proved unworkable. No clear or principled lines have emerged between sentencing differences that are "significant" and those that are not, and it seems unlikely than any non-arbitrary lines can be drawn. Thus, when it can be shown that additional imprisonment under the Guidelines was imposed solely because of counsel's inadequate representation, collateral relief under *Strickland* is warranted.

The considerations that animated the court of appeals' holding remain important ones. But proper respect for the judgment of trial and appellate lawyers in the performance analysis will weed out many of the claims that the court of appeals correctly recognized do not merit collateral relief. Indeed, in this case, a sound application of *Strickland* yields the conclusion that petitioner's counsel performed adequately. In addition, his alleged mistakes did not prejudice petitioner.

B. The assessment of counsel's performance requires deference to his strategic judgments. Issue selection is critical to effective advocacy, both at trial and on appeal. That proposition applies with special force to the Guidelines. Because of the complexity of the Guidelines, counsel must factor in not only the likelihood of success but also the magnitude of the benefit from raising an issue. He must then weigh how many issues he can raise without impairing his credibility, which remains crucial in light of the sentencing court's substantial and unreviewable discretion to impose sentence once the range is established. On appeal, the need to winnow and focus the issues is even more acute. See *Jones* v. *Barnes*, 463 U.S. 745, 751-752 (1983). Thus, only in the rare case in which an omitted Guidelines issue is

clearly stronger than the legal issues raised—as when there is controlling circuit precedent in the defendant's favor—should counsel's performance be held deficient.

According petitioner's counsel a "strong presumption" that his conduct fell "within the wide range of reasonable professional assistance," and eliminating the distortions of hindsight, *Strickland*, 466 U.S. at 689, petitioner's counsel was not deficient in failing to press more vigorously at sentencing or raise on appeal the grouping issue under Guidelines § 3D1.2. No Seventh Circuit precedent supported petitioner's position at the time of sentencing that money laundering offenses should be grouped with the underlying offenses that generated the laundered proceeds, and much out-of-circuit authority contradicted it. Nor was counsel required to be clairvoyant and foresee that the Seventh Circuit would, after the appeal had been argued, adopt a position on grouping favorable to the defense. Even that holding, moreover, might produce an increase, not a decrease, in petitioner's offense level. In view of the uncertain prospects of the grouping claim at the time of sentencing and appeal, there was no lapse in representation.

C. There was also no prejudice to petitioner from counsel's failure to press the grouping claim. The question whether petitioner was prejudiced turns initially on whether, under the Guidelines, money laundering should be grouped with the offenses that generated the proceeds. Correctly analyzed, the answer is no. And, even if grouping were required under the Seventh Circuit precedent on which petitioner now relies, *United States* v. *Wilson*, 98 F.3d 281 (7th Cir. 1996), application of that decision should lead to an increase in petitioner's sentence. Under those circumstances, petitioner cannot establish prejudice by his counsel's failure to press the grouping claim.

ARGUMENT

COUNSEL'S FAILURE TO ARGUE THAT PETITIONER'S MONEY LAUNDERING AND RACKETEERING OFFENSES SHOULD BE GROUPED UNDER THE SENTENCING GUIDELINES DID NOT CONSTITUTE INEFFECTIVE ASSISTANCE

A. *Strickland* v. *Washington* Governs Claims Of Ineffective Assistance Of Counsel At Noncapital Sentencing And Appeal

1. This Court's decision in *Strickland* v. *Washington*, 466 U.S. 668 (1984), announced a general test for claims of ineffective assistance of counsel. The Court held that a claim of ineffective assistance of counsel at trial or capital sentencing has two components. First, the defendant must show that counsel's performance was deficient, in that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687. Second, the defendant must show that "the deficient performance prejudiced the defense" (*ibid.*) in the sense that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different" (*id.* at 694). *Strickland* itself involved a capital sentencing proceeding, which the Court found enough like a trial to make the description of the duties of counsel in the two contexts essentially equivalent. *Id.* at at 686-687. The Court noted, however, that it was not required to consider "the role of counsel in an ordinary sentencing, which may involve informal proceedings and standardless discretion in the sentencer, and hence may require a different approach to the definition of constitutionally effective assistance." *Id.* at 686.

Since *Strickland*, the Court has applied its two-part test in a variety of contexts besides trial and capital sentencing. The Court has employed *Strickland* to evaluate ineffectiveness claims in the entry of a guilty plea (see *Hill* v. *Lockhart*,

474 U.S. 52, 59 (1985)) and in failing to file pre-trial motions to suppress evidence on Fourth Amendment grounds (see *Kimmelman* v. *Morrison*, 477 U.S. 365, 390-391 (1986)). The Court has also applied *Strickland* to several types of ineffectiveness claims connected with the appeals process. In particular, the Court has used the *Strickland* test to evaluate counsel's failure to raise a capital sentencing claim on appeal (see *Smith* v. *Murray*, 477 U.S. 527, 535-536 (1986)); counsel's failure to file a notice of appeal (see *Roe* v. *Flores-Ortega*, 120 S. Ct. 1029, 1034 (2000)); and counsel's decision to file an *Anders* (or equivalent) brief rather than a full merits brief on appeal (see *Smith* v. *Robbins*, 120 S. Ct. 746, 764 (2000)). Considering the wide range of claims to which the Court has applied *Strickland*, it is not surprising that the Court recently noted that "the *Strickland* test provides sufficient guidance for resolving virtually all ineffective-assistance-of-counsel claims." *Williams* v. *Taylor*, 120 S. Ct. 1495, 1512 (2000).

This case involves the issue of how ineffective assistance claims should be resolved when a defendant claims that his counsel's deficient performance resulted in a longer sentence under the Sentencing Guidelines established by the Sentencing Reform Act of 1984, Pub. L. No. 98-473, Tit. II, ch. II, 98 Stat. 1987. In our view, *Strickland*'s general approach to issues of ineffective assistance of counsel can and should apply to such claims. As this Court has held, sentencing is a critical stage of the criminal prosecution at which the defendant has a right to effective assistance of counsel. See *Mempa* v. *Rhay*, 389 U.S. 128, 134 (1967). Moreover, the advent of the Sentencing Guidelines has modified sentencing in the federal system so that the Court's concern in *Strickland* about "informal proceedings and standardless discretion" is of less significance. Although trial courts retain substantial discretion in sentencing under the Guidelines, see *Koon* v. *United States*, 518 U.S. 81 (1996), the Guidelines provide "detailed and comprehensive standards" to direct

the determination of the appropriate sentencing range. *Arredondo* v. *United States*, 178 F.3d 778, 784 (6th Cir. 1999). And the development of the Guidelines was accompanied by the creation of more formal procedures designed to promote "focused, adversarial resolution of the legal and factual issues relevant to fixing Guidelines sentences." *Burns* v. *United States*, 501 U.S. 129, 137 (1991). Particularly because sentencing rules under the Guidelines are intricate and complex, "[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel." *Gideon* v. *Wainwright*, 372 U.S. 335, 344-345 (1963) (quoting *Powell* v. *Alabama*, 287 U.S. 45, 68-69 (1932)).

Similar considerations apply to appeals raising Guidelines issues. As this Court has recognized, "[t]he need for forceful advocacy does not come to an abrupt halt as the legal proceeding moves from the trial to appellate stage." *Penson* v. *Ohio*, 488 U.S. 75, 85 (1988). In holding that the right to effective assistance of counsel extends to direct appeal of a conviction, the Court noted that "[t]o prosecute the appeal, a criminal appellant must face an adversary proceeding that—like a trial—is governed by intricate rules that to a layperson would be hopelessly forbidding. An unrepresented appellant—like an unrepresented defendant at trial—is unable to protect the vital interests at stake." *Evitts* v. *Lucey*, 469 U.S. 387, 396 (1985). That reasoning applies equally to appeals raising issues under the Guidelines. In enacting the Sentencing Reform Act of 1984, Congress "provide[d] for limited appellate review of sentences in order to ensure the proper application of the Guidelines." *Williams* v. *United States*, 503 U.S. 193, 196 (1992). Congress thus conceived of appellate review of sentences (in the limited circumstances provided in 18 U.S.C. 3742) as an integral component of the new system to ensure fair and uniform sentencing. See S. Rep. No. 225, 98th Cong., 1st Sess. 151 (1983). In addition, sentencing appeals under the Guidelines system are as

formal as appellate proceedings that relate only to the conviction. And Congress has established clear legal standards for resolution of those appeals. See 18 U.S.C. 3742(e) and (f). Consistent with the above considerations, the courts of appeals have applied the *Strickland* test to ineffective assistance of counsel claims arising from counsel's performance at Guidelines sentencing and appeals, although, like the court of appeals in this case, some courts have modified the prejudice inquiry in order to account for the particular features of noncapital sentencing.[3]

2. Although the *Strickland* test should apply to ineffective assistance claims involving sentencing proceedings and appeals under the Guidelines, the application of the test should take into account the particular characteristics of those proceedings. This Court has previously recognized that the *Strickland* inquiries must be shaped to the particular context in which they are applied. For example, in applying the performance component of the analysis to claims of ineffectiveness on appeal, the Court has recognized that the nature of appellate advocacy and the parameters imposed on the advocate require counsel to select from available claims "in order to maximize the likelihood of success." *Robbins*, 120 S. Ct. at 765; see also *Jones* v. *Barnes*, 463 U.S. 745, 751-752 (1983). Therefore, "only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be

[3] See, *e.g.*, *Arredondo*, 178 F.3d at 783-784; *United States* v. *Soto*, 132 F.3d 56, 59 (D.C. Cir. 1997); *Reece* v. *United States*, 119 F.3d 1462, 1465 (11th Cir. 1997); *Smullen* v. *United States*, 94 F.3d 20, 24 (1st Cir. 1996); *United States* v. *Breckenridge*, 93 F.3d 132, 136 (4th Cir. 1996); *United States* v. *Kissick*, 69 F.3d 1048, 1054 (10th Cir. 1995), cert. denied, 519 U.S. 1138 (1997); *United States* v. *Seyfert*, 67 F.3d 544, 547 (5th Cir. 1995); *Auman* v. *United States*, 67 F.3d 157, 161 (8th Cir. 1995); *United States* v. *Headley*, 923 F.2d 1079, 1083-1084 (3d Cir. 1991); *Janvier* v. *United States*, 793 F.2d 449, 456 (2d Cir. 1986); J.A. 52-54.

overcome." *Robbins*, 120 S. Ct. at 765 (quoting *Gray* v. *Greer*, 800 F.2d 644, 646 (7th Cir. 1986)).

The Court has similarly tailored the prejudice inquiry to fit particular contexts. In *Flores-Ortega*, 120 S. Ct. at 1037-1040 (2000), the court considered a claim that counsel was deficient in failing to consult with the defendant about filing an appeal. Because "counsel's alleged deficient performance arguably led not to a judicial proceeding of disputed reliability, but rather to the forfeiture of a proceeding itself," *id.* at 1038, the Court determined that the usual prejudice inquiry focusing on the likely outcome of the proceeding was inappropriate. Instead, the Court held, "to show prejudice in these circumstances, a defendant must demonstrate that there is a reasonable probability that, but for counsel's deficient [performance], he would have timely appealed." *Ibid.* Similarly, in *Hill* v. *Lockhart*, 474 U.S. at 52, in which the Court applied the *Strickland* framework to counseled guilty pleas, the Court held that counsel's erroneous advice that a defendant should plead guilty is prejudicial when "there is a reasonable probability that, but for counsel's errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial."

When applying *Strickland* to noncapital sentencing and appeals, reviewing courts must proceed with similar sensitivity to the nature of the sentencing process. First, the sentencing determination often involves a wide range of possible outcomes and slight differences among those outcomes. In addition, as this Court observed in *Strickland*, sentencers often exercise virtually "standardless discretion" (466 U.S. at 686) in selecting among sentencing alternatives. Those features of noncapital sentencing are most pronounced in systems that give the sentencer virtually complete discretion to select a sentence from within a wide range set by statutory minimum and maximum terms. But they are also present in systems like the federal system in which discretion is limited by Sentencing Guidelines. The Guidelines

provide a specific and detailed set of standards relating to offense behavior and offender characteristics to govern the determination of the applicable range from which the sentencing judge is to select a sentence. See 28 U.S.C. 994(b)(2); 18 U.S.C. 3553(a)(4) and (b). The judge nevertheless retains significant discretion in applying the Guidelines to the particular facts, selecting a sentence from within the applicable Guidelines range, and deciding whether to depart from the Guidelines. See 18 U.S.C. 3553. Moreover, not every claim relevant to the Guidelines criteria will change the applicable Guidelines range and, because there is substantial overlap among Guidelines ranges, not every change in the Guidelines range will have an impact on the defendant's sentence.

Because of these factors, both the prospect of prevailing on a particular claim and the potential sentencing benefit from a successful claim will often be quite uncertain. It will therefore usually be difficult, if not impossible, for a reviewing court to assess the reasonableness of counsel's decision to focus on one claim rather than another. Likewise, it will frequently be difficult or impossible for the reviewing court to determine that the failure to raise a particular claim resulted in a reasonable probability of a different sentencing outcome.

A second consideration that should inform application of the test for ineffective assistance of counsel in the noncapital sentencing context is that most sentencing errors are not cognizable on collateral review. Collateral relief is rarely available for claims that do not assert constitutional or jurisdictional errors. A non-jurisdictional claim based on a statute or rule may be raised on collateral review only if the claim alleges a "fundamental defect which inherently results in a complete miscarriage of justice" or "an omission inconsistent with the rudimentary demands of fair procedure." *Hill* v. *United States*, 368 U.S. 424, 428 (1962); see, *e.g.*, *Reed* v. *Farley*, 512 U.S. 339, 353-354 (1994). "[E]rrors of guideline interpretation or application ordinarily fall short of a

miscarriage of justice." *United States* v. *Mikalajunas*, 186 F.3d 490, 496 (4th Cir. 1999), cert. denied, 120 S. Ct. 1283 (2000).

Errors in the application of the Guidelines do not implicate the determination of guilt or innocence. Moreover, the Constitution and federal statutes provide defendants with a full and fair opportunity to litigate Guidelines claims at sentencing and on direct appeal. See Fed. R. Crim. P. 32; 18 U.S.C. 3742. Permitting routine relitigation of those claims on collateral review would impose unjustified costs on the judicial system and unnecessarily compromise the finality of criminal sentences. Therefore, the vast majority of the courts of appeals have held that, "[b]arring extraordinary circumstances, * * * an error in the application of the Sentencing Guidelines cannot be raised" in a proceeding under 28 U.S.C. 2255 (1994 & Supp. IV 1998). *United States* v. *Pregent*, 190 F.3d 279, 283-284 (4th Cir. 1999).[4] Because of the general preclusion of collateral review for Sentencing Guidelines claims, courts should not adopt a standard for ineffective assistance of counsel that permits defendants routinely to recast Guidelines claims as claims under the Sixth Amendment.

3. In light of those considerations, the Seventh Circuit correctly recognized the need to customize the *Strickland* analysis to the nature of noncapital sentencing. In its effort

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[4] See also *Jones* v. *United States*, 178 F.3d 790, 796 (6th Cir.), cert. denied, 120 S. Ct. 335 (1999); *United States* v. *Talk*, 158 F.3d 1064, 1069-1070 (10th Cir. 1998), cert. denied, 525 U.S. 1164 (1999); *Auman*, 67 F.3d at 161; *United States* v. *Schlesinger*, 49 F.3d 483, 485 (9th Cir. 1994); *United States* v. *Segler*, 37 F.3d 1131, 1134 (5th Cir. 1994); *Knight* v. *United States*, 37 F.3d 769, 773-774 (1st Cir. 1994); *Scott* v. *United States*, 997 F.2d 340, 340-341 (7th Cir 1993). But cf. *United States* v. *Essig*, 10 F.3d 968, 979 (3d Cir. 1993) (rejecting Guidelines claim on collateral attack for failure to meet cause and prejudice standard rather than because such claims are not cognizable); *Parks* v. *United States*, 832 F.2d 1244, 1246 (11th Cir. 1987) (same).

to tailor the analysis to that context, however, the court of appeals modified the prejudice inquiry in a manner that is both inconsistent with this Court's cases and unworkable.

The court of appeals' rule is that, in order to establish prejudice, a movant under Section 2255 is required to show not only that his counsel's error resulted in a higher sentence (*i.e.*, that the error had an effect on the outcome) but also that the increase was so significant that the sentence was fundamentally unfair. See J.A. 53 (citing *Martin*, 109 F.3d at 1178, and *Durrive*, 4 F.3d at 551). The court based its conclusion that an effect on the outcome is not enough to satisfy *Strickland* largely on its interpretation of *Lockhart* v. *Fretwell*, 506 U.S. 364 (1993). In *Lockhart*, a defendant claimed ineffective assistance based on his lawyer's failure to invoke a court of appeals' precedent that, at the time, would have invalidated the aggravating circumstance found by his capital sentencing jury, even though, by the time of the ineffectiveness claim, that precedent had been overruled in light of an intervening decision of this Court. *Lockhart* concluded that, in that context, proof of an effect on the outcome was not enough to show "prejudice" under *Strickland*, because such a holding would "grant the defendant a windfall to which the law does not entitle him," 506 U.S. at 370, *i.e.*, reversal even though his sentence was not "unreliable" or the proceeding "fundamentally unfair," *id.* at 372. The *Durrive* court drew from *Lockhart* the principle that a defendant must not only show that his Guidelines sentence would have been lower but for counsel's deficient performance, but that the result must be "unreliable" or "fundamentally unfair." 4 F.3d at 551.[5]

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[5] The court of appeals explained:

> In *Lockhart* v. *Fretwell*, [506 U.S. 364 (1993)], [the Court] * * * rejected the equation between causation and prejudice. "[A]n analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective. To set aside a conviction or sentence solely because the outcome would have been different but for counsel's error may grant the defendant a windfall to which the law does not entitle him." *Id.* at [369-370]. If an effect on the outcome is not enough, what is? According to *Lockhart*, the defendant must establish that counsel's shortcomings "render[ed] the result . . . unreliable or the proceeding fundamentally unfair." *Id.* at [372]. * * *
>
> Grave errors by judge and counsel might make a sentence under the Guidelines "unreliable or . . . fundamentally unfair." * * * But the difference between 120 months and 108 or even 98 (the middle of the lower range) does not demonstrate that the actual sentence is "unreliable . . . or fundamentally unfair"—is not, in the language of *Spriggs* [v. *Collins*, 993 F.2d 85, 89 n.5 (5th Cir. 1993)], a "significant" difference. * * * Adjusting the offense level by two or three steps is exactly the routine decision that is supposed to be handled at sentencing and on direct appeal. * * * [W]e therefore conclude that Durrive has not established "prejudice" within the meaning of *Strickland*.
>
> *Durrive*, 4 F.3d at 550-551 (some punctuation altered).

This Court, however, recently rejected precisely the reading of *Lockhart* on which the court of appeals based its "significant" difference test. In *Williams* v. *Taylor*, 120 S. Ct. at 1512-1513, the Court examined a state court's view that *Strickland* was not satisfied in a capital sentencing case by the finding that counsel's errors may have affected the outcome of the proceeding; it was also necessary to ask, in light of *Lockhart*, whether the resulting sentence was "fundamentally unfair or unreliable." *Id.* at 1513. The Court held that the state court's reliance on *Lockhart* was error. It explained that *Lockhart*'s conclusion rested on the fact that "the likelihood of a different outcome [was] attributable to an incorrect interpretation of the law," and that such a result would be a "'windfall' to the defendant rather than the legitimate 'prejudice' contemplated by our opinion in *Strickland*." *Id.* at 1512. In contrast, the Court made clear, *Lockhart* "do[es] not justify a departure from a straightforward application of *Strickland* when the ineffectiveness of counsel *does*

deprive the defendant of a substantive or procedural right to which the law entitles him," *id.* at 1513, and, in that setting, no "separate inquiry into fundamental fairness" is required, *ibid.* The prejudice inquiry adopted by the court of appeals requires just such a separate inquiry, and it therefore cannot be reconciled with this Court's reasoning in *Williams*.[6]

Under *Williams*, there is no need for a separate showing of unfairness, above and beyond a different outcome, because the *Strickland* test itself defines a requirement for a fundamentally fair sentence. The Court has made clear that noncapital sentencing and appeal are critical stages of the criminal prosecution at which effective representation is essential to fundamental fairness. See *Mempa*, 389 U.S. at 134; *Evitts*, 469 U.S. at 396. A defendant may not be sentenced to any term of imprisonment unless he was represented by counsel. *Argersinger* v. *Hamlin*, 407 U.S. 25, 37 (1972). And "the prospect of imprisonment for however

[6] The "significant difference" test that the Seventh Circuit adopted in *Durrive* to implement its reading of *Lockhart* also went farther than the circuit precedent on which it relied, *Spriggs* v. *Collins*, 993 F.2d 85, 88-89 (5th Cir. 1993). *Spriggs* arose on habeas review of a state sentence where the sentencing judge had broad discretion to select any sentence within a wide sentencing range. To avoid the possibility that any slight error by counsel might be said to have resulted in a harsher sentence, "even if only by a year or two," the court required a showing of "a reasonable probability that but for trial counsel's errors the defendant's non–capital sentence would have been *significantly* less harsh." *Id.* at 88-89. But the *Spriggs* court carved out from that rule a "foreseeable exception" for cases in which "a deficiency by counsel resulted in a specific, demonstrable enhancement in sentencing * * * which would not have occurred but for counsel's error." *Id.* at 88-89 n.4. In relying on *Spriggs*, the Seventh Circuit did not address that limitation, see *Durrive*, 4 F.3d at 551, which appears to cover specific, demonstrable enhancements under the Guidelines. Indeed, the Fifth Circuit recently concluded that the Seventh Circuit's "significant" difference test, as applied to Sentencing Guidelines claims, "ignored [*Spriggs*'] rationale." *United States* v. *Phillips*, 210 F.3d 345, 351 n.4 (5th Cir. 2000); see also *Martin*, 109 F.3d at 1182 (Rovner, J., dissenting from denial of rehearing en banc).

short a time will seldom be viewed by the accused as a trivial or 'petty' matter." *Ibid.* (quoting *Baldwin* v. *New York*, 399 U.S. 66, 73 (1970)). As a result, when counsel fails to meet minimum competence standards, and the deficient performance deprives the defendant of a legal right thereby causing a demonstrable increase in his sentence, the sentencing proceedings do not meet the standards of fundamental fairness that the *Strickland* test serves to protect.

The court of appeals' test has also proved unworkable. The court has not explained when an increase in a sentence is significant enough to warrant collateral relief. Indeed, there is no apparent objective test for formulating such guidance, nor is there a body of case law that might even arbitrarily establish what sort of potential decreases would be deemed significant. In *Durrive* itself, the difference would have been at least a one-year reduction in a ten-year sentence, and the court found that change not "significant." 4 F.3d at 551. The court suggested that offense level differences of "two or three steps," *ibid.*, would similarly be insignificant, but it did not so hold. In *Martin*, the court described the *Durrive* test as a "rule of proportionality: the sort of increase produced by a few levels' difference in sentencing calculations cannot be raised indirectly on collateral attack by complaining about counsel's work." 109 F.3d at 1178. But, as the district court observed, "'few' is not a precise term and the Seventh Circuit does not indicate how the difference in length of sentence should be considered." J.A. 46.

A two-level change can have vastly different consequences in different sections of the Sentencing Table.[7] At

[7] "The Sentencing Table provides a matrix of sentencing ranges. On the vertical axis of the matrix is the defendant's offense level representing the seriousness of the crime; on the horizontal axis is the defendant's criminal history category. The sentencing range is determined by identifying the intersection of the defendant's offense level and his

the top of the Sentencing Table, a two-level change could result in a difference of nearly 12 years.[8] And at the bottom of the Table, a two-level change could make the difference between a year in prison and probation.[9] The court of appeals did not indicate whether either of these reductions would be "significant," nor has it answered basic questions about how the "significance" standard is to be applied. See, *e.g.*, *Allen* v. *United States*, 175 F.3d 560, 563 (7th Cir.), cert. denied, 120 S. Ct. 432 (1999); *Martin*, 109 F.3d at 1183-1184 (Rovner, J., dissenting from denial of rehearing en banc) ("If an increase of eight or nine years is not 'significant,' what is? Does the 'significance' depend on the overall length of the petitioner's term? In other words, would an increase of a year be 'insignificant' for someone serving a ten-year term, but 'significant' for someone serving a two-year term? *Durrive* leaves such questions unanswered, freeing individual judges and panels to reach their own conclusions.").

Thus, although the Seventh Circuit properly expressed concern that ineffective assistance of counsel claims should not be a vehicle for routinely relitigating questions under the Sentencing Guidelines, its test for prejudice is an incorrect

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criminal history category." *Nichols* v. *United States*, 511 U.S. 738, 740-741 n.3 (1994). See App., *infra*, 17a.

[8] A defendant who is in criminal history category VI and has an offense level of 36 would have a sentencing range of 324 to 405 months of imprisonment. A reduction of two offense levels, however, would yield a sentencing range of 262 to 327 months of imprisonment. The top of the first range (405 months) is 143 months greater than the bottom of second range. Even selecting the midpoint of the two ranges as a basis for comparison yields a potential reduction in sentence of 70 months. See App., *infra*, 17a.

[9] A defendant who is in criminal history category I with an offense level of 10 faces 6-12 months of imprisonment. A reduction of two offense levels, however, would yield a sentencing range of 0 to 6 months of imprisonment and make the defendant eligible for probation. See App., *infra*, 17a; Guidelines § 5B1.1.

application of *Strickland*. Even though Sentencing Guidelines claims are not themselves cognizable on collateral review when the defendant *was* adequately represented, a constitutional claim of ineffective assistance based on counsel's failure to raise a Guidelines claim is cognizable when representation was deficient. Cf. *Kimmelman*, 477 U.S. at 373-383 (holding that ineffective assistance of counsel claims based on incompetent representation with respect to a Fourth Amendment issue are cognizable on collateral review even though collateral relief would not be available for the underlying Fourth Amendment claim). And, because a variety of legal determinations may have a measurable effect on the length of a Guidelines sentence, it may sometimes be possible to show that counsel's lapse has caused actual harm to the defendant. In such a case, collateral relief is warranted.

Of course, courts should scrupulously avoid treating a mere Guidelines error as equivalent to deficient performance by counsel. The nature of noncapital sentencing, even under the Guidelines, means that only in the rare case will a defendant be able to show that his attorney's performance fell outside "the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. Indeed, a proper application of the performance inquiry addresses many of the concerns that animated the court of appeals to adopt its heightened test for prejudice. See *Arredondo*, 178 F.3d at 784 (agreeing that "slight failings" by counsel are not enough to establish constitutionally deficient representation but suggesting that the "degree of the attorney's error may better be evaluated directly, under *Strickland*'s performance prong.").

Nevertheless, when a defendant can make the "highly demanding" showing (*Kimmelman*, 477 U.S. at 382) that his "counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment" (*Strickland*, 466 U.S. at 687), and his sentence is demonstrably higher than the

correct Guidelines range, he should not be barred from collateral relief on the view that the additional punishment at stake is not "significant." A defendant must show both deficient performance and prejudice to prevail, and a court need not reach both of those interrelated components of a *Strickland* claim if analysis of one will resolve the case. *Strickland*, 466 U.S. at 697. But to elucidate how we part company with the analysis of the court of appeals, it is appropriate to undertake a complete examination of both the performance inquiry and the prejudice inquiry as applied in this case.[10]

B. Counsel's Failure To Argue That Petitioner's Money Laundering And Racketeering Offenses Should Be Grouped Was Not Deficient Performance

Petitioner's complaints about counsel's performance concern counsel's advocacy on the issue whether petitioner's money laundering offenses should have been grouped with

[10] Petitioner contends (Pet. Br. 9 & n.2) that the performance inquiry is not properly before the Court. That contention misconceives the relationship between the two inquiries, a relationship that petitioner himself recognizes elsewhere in his brief (see *id.* at 29). The performance and prejudice considerations are not independent claims one of which is forfeited if not pressed in a lower court. Rather, they are arguments concerning the unitary claim of ineffective assistance of counsel. And it is well settled that, "[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1994) (quoting *Yee* v. *City of Escondido*, 503 U.S. 519, 534 (1992)). In any event, the Court has discretion to consider a claim even though it was not raised in the court of appeals, see, *e.g.*, *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 697-698 (1984), and that course is warranted here. The government made the performance argument in both the district court and our brief in opposition to the petition for certiorari. J.A. 44; Br. in Opp. 7-9. We did not make the performance argument in the court of appeals because the district court's ruling addressed only prejudice, and its analysis was mandated by circuit precedent. See Gov't C.A. Br. 6-19 (collateral review).

his conspiracy and labor racketeering offenses under Guidelines § 3D1.2. In his motion to correct his sentence under 28 U.S.C. 2255 (1994 & Supp. IV 1998), petitioner contended that counsel was ineffective in failing to argue the grouping issue adequately at sentencing and in failing to raise it at all on appeal. J.A. 34-41.

In this Court, petitioner reiterates his belief that counsel performed deficiently by not raising the grouping issue or alerting the court of appeals to *United States* v. *Wilson*, 98 F.3d 281 (7th Cir. 1996), which petitioner considers controlling precedent on the issue, and which was issued after briefing and argument but before petitioner's appeal was decided. Pet. Br. 19. Petitioner contends that, but for counsel's failings, his Guidelines range would have been lower, and he would have received a sentence between 6 and 21 months shorter than the 84 month sentence he actually received. *Ibid.* Such a sentencing disparity, he continues, satisfies the prejudice inquiry set out in *Strickland* (*id.* at 19-20), and the court of appeals erred in departing from the *Strickland* standard by requiring a more "significant" disparity (*id.* at 8-18, 20-34).[11]

Although we agree with petitioner that the court of appeals did not apply the correct prejudice inquiry, we do not believe that petitioner was denied effective assistance of counsel. In the remainder of this section of the brief, we explain why counsel's failure to raise the grouping issue did not constitute deficient performance. In the final section of the brief, we further explain why counsel's failure did not cause petitioner any prejudice cognizable under the *Strickland* standard.

[11] Although petitioner appears to focus his argument in this Court on counsel's effectiveness on direct appeal, see Pet. i; Br. 19, we have addressed counsel's effectiveness at the sentencing proceeding as well because it is not clear whether petitioner has abandoned his claim that counsel was ineffective at that proceeding.

1. In order to show that his counsel's performance was constitutionally deficient, petitioner must show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687. That requires a demonstration that "counsel's representation fell below an objective standard of reasonableness." *Id.* at 669. Moreover, because "[i]ntensive scrutiny of counsel and rigid requirements for acceptable assistance could dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client," *id* at 690, this Court has stressed that "[j]udicial scrutiny of counsel's performance must be highly deferential," *id.* at 689. Petitioner therefore must overcome "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, [petitioner] must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound * * * strategy.'" *Id.* at 689 (quoting *Michel* v. *Louisiana*, 350 U.S. 91, 100-101 (1955)).

There is a significant danger that an examination of counsel's actions after they have proved unsuccessful will lead a court to second-guess what were at the time quite reasonable decisions. See *Strickland*, 466 U.S. at 689. For that reason, in assessing counsel's performance, the Court must make "every effort * * * to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Ibid.*; see *Murray*, 477 U.S. at 536.

The nature of Guidelines sentencing makes particularly relevant this Court's guidance concerning effective assistance on appeal. An appellate lawyer need not raise every issue available but "may select from among [potential issues] in order to maximize the likelihood of success on appeal." *Robbins*, 120 S. Ct. at 765; *Barnes*, 463 U.S. at 754. Indeed,

this process of "winnowing out" issues and "focusing on one central issue if possible" (*id.* at 751) "is the hallmark of effective appellate advocacy" (*Murray*, 477 U.S. at 536). In challenging the effectiveness of appellate counsel, this Court has said that the defendant cannot prevail if he cannot show that the claim that counsel failed to raise "was clearly stronger than issues that counsel did present." *Robbins*, 120 S. Ct. at 766. Accordingly, although it is "possible to bring a *Strickland* claim based on counsel's failure to raise a particular claim [on appeal]," "it is difficult to demonstrate that counsel was incompetent." *Id.* at 765.

In Guidelines sentencing, issue selection is important not only on appeal but also at the sentencing itself. Under the Guidelines system, a probation officer prepares a presentence investigation report that contains not only information about the defendant and the offenses he committed but also recommendations about the appropriate classification of the offense and the defendant's criminal history under the criteria in the Guidelines, the appropriate Guidelines range, and whether departure is warranted. See Fed. R. Crim. P. 32(b). Just as an appellate tribunal's receptiveness to the suggestion that a lower court has erred "declines as the number of assigned errors increases," *Barnes*, 463 U.S. at 752 (quoting Robert Jackson, *Advocacy Before the United States Supreme Court*, 25 Temple L.Q. 115, 119 (1951)), the sentencing court's receptiveness to the suggestion that the presentence report overlooked or misapplied Guidelines provisions decreases with the number of suggested errors. Moreover, counsel must continuously bear in mind, in choosing how many claims to present and how forcefully to advance each of them, that the sentencer retains a great deal of unreviewable discretion. How the sentencing court exercises that discretion will often have more impact on the defendant's sentence than how the court resolves a claim concerning the proper offense level or criminal history category.

Issue selection in the Guidelines context is not only especially important but also particularly dependent on the exercise of strategic judgment. Before deciding whether to press a particular claim, counsel must assess both the prospects of prevailing and the magnitude of the possible benefit. As a result of the complexity of the Guidelines, the limited impact of small changes in the offense level or criminal history category, the overlap among sentencing ranges, and the discretion retained by the sentencing judge, those assessments are often fraught with uncertainty. For example, counsel might decide to press a claim that he believes has only a 40% chance of success rather than one with a 60% chance, because the riskier claim, if successful, would have a greater impact on the applicable sentencing range. Or counsel might forego a claim because, depending on how the sentencing judge or the court of appeals resolved an unsettled issue of Guidelines interpretation, the factor could just as likely increase as decrease the applicable sentencing range. Even if there were no danger of unintended adverse consequences, counsel might reject a claim in favor of pressing others because, although the rejected claim would affect the defendant's offense level or criminal history points, the change would not affect the sentencing range. Or counsel might decide that, even if a claim would shift the sentencing range, the shift in the range would not likely affect the defendant's actual sentence because of a substantial overlap between the ranges.[12]

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[12] The Sentencing Commission specifically structured the Sentencing Table with overlapping ranges in order to reduce such litigation. "Each level in the [sentencing] table prescribes ranges that overlap with the ranges in the preceding and succeeding levels. By overlapping the ranges, the table should discourage unnecessary litigation. Both prosecution and defense will realize that the difference between one level and another will not necessarily make a difference in the sentence that the court imposes." U.S.S.G. Ch. 1, Pt. A.4(h).

Because of these complexities, a court reviewing counsel's performance must be especially careful that its evaluation is not clouded by the distorting effects of hindsight. A reviewing court will rarely be able to conclude that an attorney performed deficiently in electing to forego an argument that had the prospect of yielding (at most) an insignificant benefit. See *Arredondo*, 178 F.3d at 787 ("A reasonable attorney might choose not to quibble over small discrepancies that ultimately would not affect the client's sentence."). Moreover, because "[t]he Sixth Amendment does not require counsel to forecast changes or advances in the law" (*Lilly* v. *Gilmore*, 988 F.2d 783, 786 (7th Cir.), cert. denied, 510 U.S. 852 (1993)), an attorney does not act unreasonably in failing to raise a claim when there is not case law or a specific Guidelines provision on point. See *United States* v. *Seyfert*, 67 F.3d 544, 547 (5th Cir. 1995). "It will often be the case that even the most informed counsel will fail to anticipate" changes in the law. *Murray*, 477 U.S. at 536. Therefore, unless it was plain, based on "directly controlling precedent," *United States* v. *Phillips*, 210 F.3d 345, 348 (5th Cir. 2000), or clear language in the Guidelines, that a claim would have had an actual positive impact on the defendant's sentence, a reviewing court should not second-guess counsel's decision to forego the claim or not press it strongly at sentencing or to abandon the claim on appeal.

2. a. Under the principles outlined above, petitioner's counsel did not perform deficiently by failing to press the grouping argument more strongly at sentencing. Counsel objected to the failure to group and thereby preserved the issue for appellate review. J.A. 89. Counsel also explained to the district court the reason that counsel believed that grouping was appropriate—petitioner's offenses (in his view) were part of "one joint effort." *Ibid.* Counsel otherwise devoted his efforts to other issues, such as opposing upward adjustments in petitioner's offense level for obstruction of justice and for a leadership role in the offense, as well as

arguing that mitigating factors warranted a sentence at the low end of the applicable range. Indeed, counsel succeeded in convincing the court that an upward adjustment was not warranted for petitioner's role in the offense. See p. 3, *supra*.

Petitioner faults counsel for not arguing the grouping issue more forcefully and points in particular to counsel's failure to respond to the position paper that the government submitted on the issue, which contained out-of-circuit precedent in support of the government's position. See J.A. 37-38. Counsel's decision not to press the argument more strongly at sentencing, however, was not outside "the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. As we explain below (see pp. 39-44, *infra*), the grouping argument lacks merit, and counsel does not act unreasonably in failing to present a meritless claim. Moreover, setting aside the claim's intrinsic lack of merit, the claim had little prospect of success at the time of sentencing. As the government explained in its position paper to the district court, see J.A. 89, at that time, no precedent of this Court or the Seventh Circuit established that petitioner's money laundering and labor racketeering offenses should be grouped together; moreover, the First, Ninth, and Tenth Circuits had all rejected grouping of fraud offenses with money laundering offenses. See *United States* v. *Kunzman*, 54 F.3d 1522, 1530-1531 (10th Cir. 1995); *United States* v. *Lombardi*, 5 F.3d 568, 570-571 (1st Cir. 1993); *United States* v. *Taylor*, 984 F.2d 298, 302-303 (9th Cir. 1993); *United States* v. *Johnson*, 971 F.2d 562, 575-576 (10th Cir. 1992); cf. *United States* v. *Harper*, 972 F.2d 321, 321-323 (11th Cir. 1992) (rejecting grouping of drug trafficking and money laundering); *United States* v. *Porter*, 909 F.2d 789, 792-793 (4th Cir. 1990) (rejecting grouping of gambling and money laundering). The Fifth and Third Circuits had held that grouping was appropriate in some circumstances. See *United States* v. *Leonard*, 61 F.3d 1181, 1185-1186 (5th Cir. 1995); *United States* v. *Cusumano*,

943 F.2d 305, 312-314 (3d Cir. 1991), cert. denied, 502 U.S. 1036 (1992). Those decisions did not necessarily support grouping of petitioner's offenses, however, because they approved grouping when the "money laundering activities of the defendants perpetuate the underlying crimes" and the offenses are therefore a "single, integrated scheme" (*Leonard*, 61 F.3d at 1186), a circumstance not present in petitioner's case (see J.A. 130-135).

Not only was there little likelihood that the grouping claim would prevail, but there was a significant possibility that grouping petitioner's offenses would result in an increase in his sentence. As we explain in more detail below (see pp. 44-48, *infra*), although grouping under Guidelines § 3D1.2(c) (as the PSR had recommended) would have resulted in a reduction in petitioner's offense level and sentencing range, grouping under Guidelines § 3D1.2(d) would have resulted in an increase in the offense level and sentencing range. And the chance that the court (if it grouped the offenses at all) would group them under subsection (d) rather than (c) was not insubstantial: The Fifth Circuit decision approving grouping had done so under subsection (d). See *Leonard*, 61 F.3d at 1185. Moreover, the Seventh Circuit's later decision in *Wilson*, 98 F.3d at 284, on which petitioner relies in asserting that counsel's error prejudiced him (Pet. Br. 19), approved grouping under subsection (d).[13] In light

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[13] Indeed, in *Wilson* itself, grouping under subsection (d) increased the offense level and thus should have resulted in a longer sentence. See *United States* v. *Wilson*, 131 F.3d 1250, 1251 (7th Cir. 1997). The court of appeals ultimately concluded, on Wilson's second appeal, that the increased offense level could not be imposed, because of a waiver by the government. *Id.* at 1253-1254. We disagree with the court's waiver analysis, see note 19, *infra*, but the salient point here is that, in 1996, petitioner's counsel could have reasonably concluded that grouping under subsection (d) would leave his client worse off, not better off, and no counsel could have foreseen the Seventh Circuit's waiver holding in the second *Wilson* appeal.

of these considerations, counsel's decision not to press the grouping issue more forcefully at sentencing was not unreasonable.

b. For similar reasons, counsel did not perform deficiently in failing to raise the grouping issue on appeal. The fact that counsel raised the issue at sentencing shows that his decision to bypass the issue on appeal was not the result of ignorance of the factual or legal basis for the claim; rather he made a tactical decision to focus on other claims in order "to maximize the likelihood of success." *Robbins*, 120 S. Ct. at 765. Such "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Strickland*, 466 U.S. at 690.

Counsel's primary argument on direct appeal was that the district court abused its discretion in admitting into evidence a portion of the transcript of petitioner's testimony from his first trial while denying his request, under Federal Rule of Evidence 106, to admit nearly all of that testimony for the purpose of placing that portion in a proper context. If successful, this claim would have required reversal of petitioner's convictions. The court of appeals rejected the claim on the ground that petitioner had failed to establish the need to introduce nearly all of the testimony from his first trial (J.A. 138-145), despite petitioner's argument that editing the testimony would have created a "choppy montage" devoid of "temporal continuity" and left the jury with an "incomplete impression of the evidence" (Pet. C.A. Br. 19 (direct appeal)). In addition, counsel raised a challenge to petitioner's sentence—that the district court's decision to increase petitioner's base offense level for obstruction of justice (based on the court's finding that petitioner perjured himself at his first trial) lacked an adequate factual basis. J.A. 145. If successful, that contention would have reduced petitioner's offense level by two levels and lowered his sentencing range below the sentence that he had received. The court of appeals considered the two issues that counsel

raised sufficiently substantial to warrant detailed discussion and refutation in a several page published opinion. See J.A. 129-147.

It was not unreasonable for counsel to focus on those other issues rather than grouping. At the time that counsel determined his strategy and prepared his brief in April 1996, there was still no Seventh Circuit precedent on point on the grouping issue. The Eleventh Circuit had weighed in on the side of grouping money laundering with underlying fraud offenses, but that court (like the courts that had approved grouping at the time of petitioner's sentencing) had relied on the fact that the laundered funds were reinvested in the fraudulent scheme. See *United States* v. *Mullens*, 65 F.3d 1560, 1564 (11th Cir. 1995), cert. denied, 517 U.S. 1112 (1996).[14] That is not true in petitioner's case. J.A. 130-135. Moreover, the Eleventh Circuit (like the Fifth Circuit in *Leonard*, 61 F.3d at 1185) held that grouping was required under Guidelines § 3D1.2(d), which would have resulted in an increase rather than a decrease in petitioner's sentence. See pp. 44-48, *infra*. Because it was far from certain that raising the grouping issue would have had an actual positive impact on petitioner's sentence, counsel's decision to forego that issue in favor of others that he viewed as more promising was reasonable.

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[14] Since then, two more courts have rejected grouping. See *United States* v. *Napoli*, 179 F.3d 1, 8-12 (2d Cir. 1999), cert. denied, 120 S. Ct. 1176 (2000); *United States* v. *O'Kane*, 155 F.3d 969, 973-974 (8th Cir. 1998); see also *United States* v. *Kneeland*, 148 F.3d 6, 15 (1st Cir. 1998). One additional court has endorsed grouping when the laundered funds are reinvested in the fraudulent scheme, see *United States* v. *Walker*, 112 F.3d 163, 167 (4th Cir. 1997), but no grouping when they are not. See *United States* v. *McMahon*, 133 F.3d 918 (4th Cir. 1997) (Table). Similarly, the Eleventh Circuit has declined to require grouping when the laundered funds are not used to perpetuate the fraud. See *United States* v. *McClendon*, 195 F.3d 598, 602 (1999).

The Seventh Circuit's decision in *United States* v. *Wilson*, 98 F.3d 281 (1996), which was issued one month after oral argument in petitioner's appeal, and which endorsed grouping of money laundering offenses with underlying fraud offenses under Guidelines § 3D1.2(d), does not alter that conclusion. Even if the *Wilson* decision were helpful to petitioner, counsel's failure to anticipate it would not establish that his performance was deficient. Counsel's decisions must be evaluated from his perspective at the time he made them, see *Murray*, 477 U.S. at 536, and it was far from certain at that time that the grouping argument would prevail and result in an actual decrease in petitioner's sentence.

Because *Wilson* was decided before the court of appeals issued its decision in this case (but after briefing and oral argument), petitioner faults counsel for failing to raise the grouping issue in a supplemental filing. Pet. 6; Br. 19. By that time, however, any grouping issue was waived. It is well settled that an appellant waives consideration of a claim advanced for the first time in a reply brief or later filing. See, *e.g.*, *Dunham* v. *Kisak*, 192 F.3d 1104, 1110 (7th Cir. 1999); *United States* v. *Universal Mgmt. Servs., Inc.*, 191 F.3d 750, 759 (6th Cir. 1999), cert. denied, 120 S. Ct. 2740 (2000); *Orsini* v. *Wallace*, 913 F.2d 474, 476 n.2 (8th Cir. 1990), cert. denied, 498 U.S. 1128 (1991). It is especially appropriate that an appellant's failure to raise a claim in his initial brief be deemed a waiver where, as here, the availability of the claim was known to him when he prepared the brief, and he made a reasonable tactical decision not to raise it. Accordingly, petitioner's counsel did not provide ineffective representation by declining to raise belatedly a claim that he had previously waived.

C. Petitioner Was Not Prejudiced By Counsel's Failure To Raise The Grouping Claim

1. Counsel's failure to press the grouping claim more strongly at sentencing or to raise the claim on appeal also did not prejudice petitioner. In *Strickland*, the Court held that, in order to show prejudice, a defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 694. Therefore, with respect to his claim of ineffectiveness at sentencing, petitioner must show that there is a reasonable probability that, absent counsel's error, he would have received a shorter sentence. See, *e.g.*, *United States* v. *Soto*, 132 F.3d 56, 59 (D.C. Cir. 1997); *United States* v. *Breckenridge*, 93 F.3d 132, 136 (4th Cir. 1996); *United States* v. *Headley*, 923 F.2d 1079, 1084 (3d Cir. 1991); *United States* v. *Ford*, 918 F.2d 1343, 1350 (8th Cir. 1990). And, as to his claim of ineffectiveness on appeal, petitioner must show that there is a reasonable probability that, but for counsel's error, he would "have prevailed on his appeal." *Robbins*, 120 S. Ct. at 764. *E.g.*, *United States* v. *Mannino*, 212 F.3d 835, 844 (3d Cir. 2000); *United States* v. *Williamson*, 183 F.3d 458, 463-464 (5th Cir. 1999); *United States* v. *Lopez*, 100 F.3d 113, 119-121 (10th Cir. 1996).

The reasonable probability test is "highly demanding." *Kimmelman* v. *Morrison*, 477 U.S. 365, 382 (1986). Because the test is designed to determine whether counsel's error "actually had an adverse effect on the defense," *Roe* v. *Flores-Ortega*, 120 S. Ct. 1029, 1037 (2000) (quoting *Strickland*, 466 U.S. at 693), petitioner must overcome the "strong presumption" that the result of the relevant proceeding was reliable. *Ibid.* (citing *Robbins*, 120 S. Ct. at 765 (citing *Strickland*, 466 U.S. at 696)). It is not sufficient to show that counsel's purported failings had a "conceivable effect on the outcome." *Strickland*, 466 U.S. at 693. Nor is it enough to show a "reasonable *possibility*" of a different outcome. See

Strickler v. *Greene*, 527 U.S. 263, 291 (1999) (applying identical *Brady* prejudice standard).

Sentencing proceeding prejudice. Because of the nature of the Guidelines system, it will often be difficult for a defendant to establish the necessary degree of probability that an omitted legal claim (even if meritorious) would have affected the outcome of the sentencing proceeding. In particular, a defendant who cannot demonstrate that presentation of the omitted claim would have resulted in a reduction in his Guidelines range to a point below the sentence that he received will not be able to make the requisite showing. The reasonable probability test is premised on the existence of "standards that govern the decision," and "[t]he assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying" those standards. *Strickland*, 466 U.S. at 695. The sentencing court, however, has almost complete discretion to select a sentence from within the applicable Guidelines range. In addition, the prejudice determination "should not depend on the idiosyncracies of the particular decisionmaker, such as unusual propensities toward harshness or leniency." *Ibid.* Neither the usual sentencing practices of the judge who sentenced the defendant nor evidence of what that particular judge might have done absent counsel's errors may permissibly inform the prejudice determination. See *id.* at 695, 700. Therefore, it will generally be impossible to determine what sentence a court would have selected from within the applicable Guidelines range. As a consequence, when the legal claim that counsel failed to present adequately would not have resulted in a Guidelines range below the defendant's sentence, the defendant will be unable "to establish a reasonable *probability* of a different result." *Strickler*, 527 U.S. at 291. *E.g.*, *United States* v. *Segler*, 37 F.3d 1131, 1136 (5th Cir. 1994).

The same conclusion does not hold, however, for a defendant who can demonstrate that he received a sentence that

exceeded the Guidelines range that would have applied to him if his counsel had not omitted a meritorious claim. Because departures from the applicable range are unusual, see *Koon* v. *United States*, 518 U.S. 81, 98 (1996), a defendant who establishes that, but for his counsel's error, his sentence was outside the correct sentencing range will generally establish a reasonable probability that, but for counsel's error, he would have received a shorter sentence.

Appellate prejudice. When a defendant claims ineffective assistance on appeal, the appropriate focus for assessing prejudice is on the outcome of the appellate proceeding. Therefore, if the defendant shows that counsel unreasonably failed to raise a meritorious legal issue that would have resulted in a remand for resentencing, the defendant has shown prejudice under the applicable standard. See, *e.g.*, *Mannino*, 212 F.3d at 844; *Phillips*, 210 F.3d at 350 ("In the appellate context, the prejudice prong first requires a showing that we would have afforded relief on appeal."). Some courts of appeals have held that a defendant may appeal his sentence on the ground that the district court employed an erroneous sentencing range, even if, because of overlap among ranges, the sentence that the defendant received fell within the range that the defendant contends should have applied. See *United States* v. *Lavoie*, 19 F.3d 1102, 1103 (6th Cir. 1994); *United States* v. *Fuente-Kolbenschlag*, 878 F.2d 1377, 1379 (11th Cir. 1989). Assuming those decisions are correct, a defendant may in some circumstances be able to show prejudice from counsel's purportedly deficient performance on appeal even though the sentence that the defendant received is within the sentencing range that would have applied on remand from the appeal. The defendant will, however, usually be unable to show that counsel's performance was in fact deficient under those circumstances. As we noted in discussing the performance inquiry, a reviewing court will rarely be able to conclude that counsel acted unreasonably in deciding not to press a claim

that would not have had a certain and positive impact on the defendant's sentence. See p. 29, *supra*.

2. Petitioner contends that, if his counsel had competently argued that his money laundering offenses should have been grouped with his labor racketeering offenses, his sentencing range would have been 63 to 78 months, which is below the 84 month sentence that he received. Pet. Br. 19. If petitioner's contention were correct, he would have shown a reasonable probability of a different outcome on appeal because the court of appeals would have remanded for resentencing. And he would have shown a reasonable probability of a different outcome at sentencing because, as we have explained, it is reasonably probable that the district court would have sentenced him within the applicable, lower range.

Petitioner's contention is not correct, however, for two reasons: First, his contention depends on the assumption that the grouping claim has merit. In fact, the claim is not meritorious. Second, even if petitioner were correct that his money laundering and labor racketeering offenses should have been grouped under Guidelines § 3D1.2(d), grouping under subsection (d) should increase rather than decrease the applicable Guidelines range. We address each of these points in turn.

a. When a claim of ineffectiveness is based on counsel's failure to advance (or competently to advance) a particular legal claim, the defendant cannot show a reasonable probability of a different outcome unless he establishes that the claim has merit. See *Kimmelman*, 477 U.S. at 375 (explaining that "in order to demonstrate actual prejudice" from "defense counsel's failure to litigate a Fourth Amendment claim competently, * * * the defendant must * * * prove that his Fourth Amendment claim is meritorious"). Petitioner therefore must show that his grouping claim has merit.

Petitioner cannot make that showing in this Court simply by relying on the Seventh Circuit's holding in *Wilson*, 98 F.3d at 284, that grouping is required by Guidelines § 3D1.2(d). This Court has explained that "the likelihood of a different outcome attributable to an incorrect interpretation of the law should be regarded as a potential 'windfall' to the defendant rather than the legitimate 'prejudice' contemplated by [the Court's] opinion in *Strickland*." *Williams* v. *Taylor*, 120 S. Ct. 1495, 1512 (2000); see *Lockhart* v. *Fretwell*, 506 U.S. 364, 369-372 (1993). Thus, in order to show cognizable prejudice from counsel's performance either at sentencing or on appeal, petitioner must show that he has a "right" to grouping under the Guidelines. *Williams*, 120 S. Ct. at 1513.

Petitioner has no such right. Guidelines § 3D1 provides rules for determining a single offense level that encompasses all of the counts of which a defendant is convicted. See U.S.S.G. Ch. 3, Pt. D, intro. comment. "In order to limit the significance of the formal charging decision and to prevent multiple punishment for substantially identical offense conduct" (*ibid.*), § 3D1 requires grouping of counts "involving substantially the same harm" (Guidelines § 3D1.2). The principle underlying the grouping rules is that conviction on an additional count should not result in a sentence enhancement unless the additional count "represent[s] additional conduct that is not otherwise accounted for by the guidelines." U.S.S.G. Ch. 3, Pt. D, intro. comment.

Guidelines § 3D1.2 provides that "[a]ll counts involving substantially the same harm shall be grouped together into a single Group." The Section then goes on to specify the four circumstances in which that condition is met:

(a) When counts involve the same victim and the same act or transaction.

(b) When counts involve the same victim and two or more acts or transactions connected by a common

criminal objective or constituting part of a common scheme or plan.

(c) When one of the counts embodies conduct that is treated as a specific offense characteristic in, or other adjustment to, the guideline applicable to another of the counts.

(d) When the offense level is determined largely on the basis of the total amount of harm or loss, the quantity of a substance involved, or some other measure of aggregate harm, or if the offense behavior is ongoing or continuous in nature and the offense guideline is written to cover such behavior.

Guidelines § 3D1.2. Petitioner's money laundering and labor racketeering offenses fit none of the four circumstances.

Subsection (a). Petitioner acknowledged in his Section 2255 motion that grouping is not appropriate under subsection (a) because his money laundering was a separate act or transaction from his labor racketeering. J.A. 25.

Subsection (b). Grouping is also not appropriate under subsection (b) because petitioner's money laundering and his labor racketeering had separate victims. Petitioner's labor racketeering, which involved his solicitation and receipt of kickbacks in exchange for funneling Union investments to particular brokers, was a crime against the Union. Petitioner's money laundering, by contrast, had no identifiable victim. Rather, money laundering is a crime against society in general. See, *e.g.*, *United States* v. *Napoli*, 179 F.3d 1, 7-8 (2d Cir. 1999), cert. denied, 120 S. Ct. 1176 (2000); *United States* v. *Kunzman*, 54 F.3d 1522, 1531 (10th Cir. 1995); *United States* v. *Lombardi*, 5 F.3d 568, 570 (1st Cir. 1993); *United States* v. *Harper*, 972 F.2d 321, 322 (11th Cir. 1992). Money laundering "harms society's interest in discovering and deterring criminal conduct, because by laundering the

proceeds of crime, the criminal vests that money with the appearance of legitimacy." *United States* v. *O'Kane*, 155 F.3d 969, 972 (8th Cir. 1998).

The Commentary to the Guidelines makes clear that "[t]he term 'victim' [in Section 3D1.2] is not intended to include indirect or secondary victims. * * * For offenses in which there are no identifiable victims (*e.g.*, drug or immigration offenses, where society at large is the victim), the 'victim' for purposes of subsections (a) and (b) is the societal interest that is harmed." Guidelines § 3D1.2, comment. (n.2). Thus, petitioner's money laundering and labor racketeering offenses had different victims within the meaning of subsection (b) and should not have been grouped under that subsection. See *O'Kane*, 155 F.3d at 972; *Kunzman*, 54 F.3d at 1531; *Lombardi*, 5 F.3d at 570.[15]

Subsection (c). Grouping petitioner's labor racketeering offenses with his money laundering offenses also is not appropriate under subsection (c). That subsection "prevents 'double counting' of offense behavior." Guidelines § 3D1.2, comment. (n.5). It therefore requires grouping when "one of the counts embodies conduct that is treated as a specific offense characteristic in, or other adjustment to, the guideline applicable to another of the counts." Guidelines § 3D1.2(c). The conduct involved in money laundering is not treated as a specific offense characteristic in labor racketeering. See Guidelines §§ 2E1.1(a), 2E5.1(b). Nor is the conduct involved in labor racketeering treated as a specific offense characteristic in money laundering. See Guidelines § 2S1.1(b). Moreover, petitioner's labor racketeering offense level was not adjusted upward because of his money launder-

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[15] Some courts have concluded that money laundering has the same victim as the underlying fraud when the laundered money is used to perpetuate the fraudulent scheme. See *Napoli*, 179 F.3d at 8 n. 3 (citing cases and reserving question). In this case, however, petitioner did not reinvest the laundered funds in that manner. See pp. 30-31, 33, *supra*.

ing, and petitioner's money laundering offense level was not adjusted upward because of his labor racketeering. See J.A. 67-69, 84.[16] Punishing petitioner independently for his labor racketeering and his money laundering thus does not involve "double counting" and is not precluded by subsection (c). Cf. *Lombardi*, 5 F.3d at 570-571 (rejecting grouping of wire fraud and money laundering under subsection (c) even when the defendant's money laundering offense level was adjusted upward for knowledge that laundered funds were the proceeds of mail fraud).

Subsection (d). Finally, subsection (d) also does not require grouping of petitioner's money laundering and labor racketeering offenses. As described above, that subsection calls for grouping of offenses when "the offense level is determined largely on the basis of the total amount of harm or loss, the quantity of a substance involved, or some other measure of aggregate harm." Guidelines § 3D1.2(d). At first glance, grouping of money laundering and labor racketeering might seem appropriate under that language because the guidelines for both offenses measure some part of the respective harms in monetary terms. Moreover, subsection (d) contains a list of offenses "to be grouped" under its provisions, and both labor racketeering and money laundering

[16] Petitioner's offense level for labor racketeering was adjusted upward for obstruction of justice. J.A. 84. The basis for that adjustment, however, was not petitioner's money laundering but his perjury at his first trial. *Ibid.* Petitioner's offense level for labor racketeering was also adjusted upward because he was a fiduciary of the Union that he defrauded. J.A. 66. And petitioner's offense level for money laundering was increased because he abused a position of trust. J.A. 68. The language of subsection (c), however, does not require that two counts be grouped when the offense level for each of the two counts is adjusted upward based on related conduct. That situation does not result in double counting because, even when two counts are not grouped together, only the higher of the two adjusted offense levels is used to calculate the combined offense level. See Guidelines § 3D1.4.

are included on that list. Careful analysis, however, demonstrates that grouping of money laundering and labor racketeering under subsection (d) is not appropriate.

As an initial matter, the fact that money laundering offenses are to be grouped under subsection (d) and labor racketeering offenses are also to be grouped under that subsection does not mean that the two categories of offenses are to be grouped together. See *Napoli*, 179 F.3d at 9 n.4; cf. *Harper*, 972 F.2d at 322 (drug trafficking offenses cannot sensibly be grouped with money laundering offenses even though both categories appear on the list of offenses to be grouped). As the examples in the Commentary to the Guidelines make clear, the primary situation in which grouping occurs under subsection (d) is when a defendant is charged with multiple counts of the same offense or substantially similar offenses. See Guidelines § 3D1.2, comment. (n.6); *O'Kane*, 155 F.3d at 973-974. Another common situation that triggers grouping under subsection (d) is when a defendant is charged both with an underlying offense and with conspiracy, attempt, or solicitation to commit that offense. Guidelines § 3D1.2, comment. (n.6). Thus, petitioner's twelve counts of labor racketeering were grouped together and with his racketeering conspiracy count under subsection (d). See J.A. 85.

Application Note 6 makes clear that different offenses are to be grouped together under subsection (d) only if they are "of the same general type." Guidelines § 3D1.2, comment. (n.6). Several factors indicate that money laundering and labor racketeering do not meet that description. First, they entail different kinds of proscribed conduct that harm different victims. See pp. 40-42, *supra*. Second, although the guidelines for money laundering and labor racketeering both measure the harm from the relevant offense in monetary terms, the guidelines use different values to measure the harm from each. See *United States* v. *Taylor*, 984 F.2d 298, 303 (9th Cir. 1993); *United States* v. *Johnson*, 971 F.2d 562,

576 (10th Cir. 1992). The harm caused by a labor racketeering offense is measured by the amount of the illicit gain—that is, by the value of the prohibited payment or the improper benefit to the payer, whichever is greater. Guidelines § 2E5.1(b)(2). The harm caused by money laundering, on the other hand, is measured by "the magnitude of the criminal enterprise, and the extent to which the defendant aided the enterprise" (Guidelines § 2S1.1, comment.)—that is, by the value of the laundered funds (Guidelines § 2S1.1(b)(2)). Third, the money laundering guideline and the labor racketeering guideline each translate the monetary values that they consider into specific offense level increases at different rates and using different monetary division points. Compare Guidelines § 2S1.1(b)(2) with §§ 2E5.1(b)(2) and 2F1.1(b)(1). In contrast, the guidelines for the property offenses that are listed in Application Note 6 as examples of offenses of "the same general type" all translate the amount of "losses" involved into offense level increases at exactly the same rate and using exactly the same monetary division points. See Guidelines §§ 2B1.1(b)(1) (larceny and embezzlement), 2F1.1(b)(1) (forgery and fraud); Guidelines § 3D1.2, comment. (n.6) (larceny, embezzlement, forgery and fraud are offenses of "the same general type"); *Napoli*, 179 F.3d at 11-12.

Money laundering and labor racketeering thus "entail different kinds of proscribed conduct, punishable on different scales, which harm distinct and different victims." *O'Kane*, 155 F.3d at 972. As a result, grouping the two sets of offenses is inappropriate not only because the offenses are not "of the same general type" but also because it would not serve the purpose of the grouping rules, which is "to prevent multiple punishment for *substantially identical* offense conduct." U.S.S.G. Ch. 3, Pt. D intro. comment (emphasis added).

b. Even if petitioner's money laundering and labor racketeering offenses should have been grouped together under

subsection (d) (as the Seventh Circuit's decision in *Wilson*, 98 F.3d at 284, suggests), petitioner could not show prejudice from counsel's performance at sentencing because grouping under that subsection (properly applied) would have increased rather than decreased petitioner's sentencing range. To understand why that is so, it is necessary to review how petitioner's sentencing range was calculated and how the calculation would change if the racketeering and money laundering offenses were grouped together under subsection (d).[17]

Petitioner's racketeering offenses were assigned a base level of ten. J.A. 66; Guidelines § 2E5.1(a)(1). That level was adjusted upward by two levels because petitioner was a fiduciary of the Union that was victimized by his racketeering scheme. J.A. 68; Guidelines § 2E5.1(b)(1). The offense level was adjusted upward two additional levels based on the district court's determination at sentencing that petitioner committed perjury at his first trial. J.A. 67, 84; Guidelines § 3C1.1. Finally, the offense level was increased by 12 levels because the total value of the commissions paid as a result of petitioner's racketeering scheme was approximately $1,802,000. J.A. 66-67; Guidelines §§ 2E5.1(b)(2), 2F1.1(b)(1)(M). As a result, the adjusted offense level for the racketeering offenses was 26. J.A. 85.

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[17] Petitioner's sentencing range would in fact have been lower if his offenses had been grouped under subsections (a), (b) or (c). As we have explained, however, grouping is clearly not appropriate under those provisions. See pp. 40-42, *supra*. To our knowledge, no court of appeals has approved grouping of money laundering and underlying fraud or racketeering offenses under subsections (a) or (c), and only one court has done so under subsection (b). In that case, moreover, unlike in this one, the laundered funds were used to further the underlying fraud. See *Cusumano*, 943 F.2d at 307-308, 312-314 (money laundering and kickbacks part of one overall scheme when laundered money was used to bribe Fund administrator to direct Fund business to broker who paid kickbacks to defendant from his commissions).

The base offense level for petitioner's money laundering offenses was 20. J.A. 67; Guidelines § 2S1.1(a)(2). That base offense level was increased by two levels because petitioner abused a position of trust and by an additional two levels because petitioner obstructed justice. J.A. 68-69; Guidelines §§ 3B1.3, 3C1.1. Finally, the offense level was increased by two levels to account for the value of the funds that petitioner laundered—$250,000. J.A. 67; Guidelines § 2S1.1(b)(2)(C). As a result, the adjusted base offense level for the money laundering offenses was also 26. J.A. 85.

Because the racketeering offenses and the money laundering offenses were not grouped, the combined offense level was determined by taking the offense level applicable to the group with the highest offense level (which was 26, since the offense levels of both groups were the same) and adding two levels because there were two groups of equally serious offenses. J.A. 85; Guidelines § 3D1.4. As a result, petitioner's total offense level was 28. J.A. 85. Together with his criminal history category of I, that offense level yielded an applicable sentencing range of 78 to 97 months. J.A. 86. Petitioner was sentenced to 84 months of imprisonment. J.A. 129.

As we have explained, offenses are grouped together under subsection (d) only if the offense level for each of the offenses is determined on the basis of aggregate harm. See pp. 42-44, *supra*. Therefore, when offenses are grouped under subsection (d), the offense level applicable to the group is calculated using the aggregate harm from all the offenses. Guidelines § 3D1.3(b). When the grouped offenses are governed by different guidelines, as money laundering and labor racketeering are, the combined offense level is determined by using the guideline that produces the highest offense level based on that aggregate harm. *Ibid.*

If petitioner's racketeering and money laundering offenses had been grouped, the offense level for the money laundering offenses would have been higher than it was

absent the grouping. Rather than using only the $250,000 in laundered funds to calculate the appropriate adjustment for the harm caused, the court would have been required to use the combined total of the laundered funds and the $1,802,000 in commissions—$2,052,000. Guidelines § 3D1.3(b). See *Napoli*, 179 F.3d at 12; *O'Kane*, 155 F.3d at 973. Therefore, there would have been a six level adjustment to the base offense level for money laundering (rather than the two level adjustment that applied absent grouping). See Guidelines § 2S1.1(b)(2)(G). As a result, petitioner's adjusted offense level for the money laundering offenses would have been 30 (rather than 28, the level it was without grouping). Because the adjusted offense level of 30 for the money laundering offenses would have been higher than the adjusted offense level of 26 for the racketeering offenses,[18] the court would have used the level of 30 to calculate the applicable sentencing range. Guidelines § 3D1.3(b). The offense level of 30, combined with petitioner's criminal history category of I, would have yielded a sentencing range of 97 to 121 months, well above the 78 to 97 month range and 84 month sentence that petitioner received without grouping.[19]

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[18] The offense level for the racketeering offenses would not have changed even if the laundered funds were added to the commissions for purpose of determining the appropriate adjustment to the offense level for the aggregate harm. See Guidelines § 2F1.1(b)(1)(M).

[19] The government has not waived the right to argue for use of the combined total of the racketeering commissions and laundered funds if the racketeering and money laundering counts were to be grouped. At the original sentencing, the government did not urge that the racketeering commissions be included as relevant conduct to the money laundering offenses, see Guidelines § 1B1.3(a)(2), because of its position that the money laundering and racketeering counts should not be grouped. See generally *United States* v. *Watts*, 519 U.S. 148. 152-153 (1997) (per curiam) (discussing relevant conduct provisions). In somewhat comparable circumstances, the Seventh Circuit in *United States* v. *Wilson*, 131 F.3d at 1253-1254, concluded that the government's failure to urge a relevant conduct argument at the original sentencing waived its right to ask that the

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As a review of the Guidelines calculations in this case illustrates, counsel should rarely be found to have rendered deficient performance by failing to anticipate a ruling by a court of appeals interpreting the Guidelines, and this is not such a rare case. Further, a correct application of the Guidelines in this case would not have lowered petitioner's sentence. For both of those reasons, petitioner's counsel did not render ineffective assistance.

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fraud loss be considered in determining the aggregate harm under the money laundering guideline, after the court of appeals had remanded for grouping of the fraud and money laundering offenses under Guidelines § 3D1.2(d) in *United States* v. *Wilson*, 98 F.3d 281 (1996). The Seventh Circuit's waiver holding, however, presupposes that the government could have urged a relevant conduct adjustment to the money laundering counts *without* also urging grouping. 131 F.3d at 1253. That is clearly incorrect. If two offenses are "of a character for which § 3D1.2(d) would require grouping of multiple counts," Guidelines § 1B1.3(a)(2), the government could not have urged that the offenses be treated as relevant conduct without also arguing that the Guidelines required grouping. The court of appeals held to the contrary because it misread Guidelines § 1B1.3(a)(2) as permitting a relevant conduct adjustment without grouping of multiple counts. 131 F.3d at 1253. But a relevant conduct adjustment under subsection 1B1.3(a)(2) is permissible absent grouping only when a defendant is convicted of a single count. When there are multiple counts, as here, groupable counts must be grouped. Guidelines § 3D1.2 ("All counts involving substantially the same harm *shall* be grouped together into a single group.") (emphasis added). Accordingly, after the government's position on grouping was rejected in the first *Wilson* opinion, the government should have been permitted to urge a correct application of the grouping rules, *i.e.*, one that took into account "the combined offense behavior taken as a whole." Guidelines § 3D1.3, comment. (n.3).

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

RELEVANT STATUTES AND GUIDELINES PROVISIONS

1. Section 3553 of Title 18, United States Code, provides:

(a) FACTORS TO BE CONSIDERED IN IMPOSING A SENTENCE.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, and that are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code;

(5) any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2) that is in effect on the date the defendant is sentenced;

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

(b) APPLICATION OF GUIDELINES IN IMPOSING A SENTENCE.—The court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In

the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

(c) STATEMENT OF REASONS FOR IMPOSING A SENTENCE.—The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence—

(1) is of the kind, and within the range, described in subsection (a)(4), and that range exceeds 24 months, the reason for imposing a sentence at a particular point within the range; or

(2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described.

If the court does not order restitution, or orders only partial restitution, the court shall include in the statement the reason therefor. The court shall provide a transcription or other appropriate public record of the court's statement of reasons to the Probation System, and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.

(d) PRESENTENCE PROCEDURE FOR AN ORDER OF NOTICE.—Prior to imposing an order of notice pursuant to section 3555, the court shall give notice to the defendant and the Government that it is considering imposing such an order. Upon motion of the defendant or the Government, or on its own motion, the court shall—

(1) permit the defendant and the Government to submit affidavits and written memoranda addressing matters relevant to the imposition of such an order;

(2) afford counsel an opportunity in open court to address orally the appropriateness of the imposition of such an order; and

(3) include in its statement of reasons pursuant to subsection (c) specific reasons underlying its determinations regarding the nature of such an order.

Upon motion of the defendant or the Government, or on its own motion, the court may in its discretion employ any additional procedures that it concludes will not unduly complicate or prolong the sentencing process.

(e) LIMITED AUTHORITY TO IMPOSE A SENTENCE BELOW A STATUTORY MINIMUM.—Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.

(f) LIMITATION ON APPLICABILITY OF STATUTORY MINIMUMS IN CERTAIN CASES.—Notwithstanding any other provision of law, in the case of an offense under section 401, 404, or 406 of the Controlled Substances Act (21 U.S.C. 841, 844, 846) or section 1010 or 1013 of the Controlled Substances Import and Export Act (21 U.S.C. 960, 963), the court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission under section 994 of title 28 without regard to any statutory minimum sentence, if the court finds at sentencing, after the Government has been afforded the opportunity to make a recommendation, that—

(1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines;

(2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;

(3) the offense did not result in death or serious bodily injury to any person;

(4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act; and

(5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

2. Section 3742 of Title 18, United States Code, provides:

(a) APPEAL BY A DEFENDANT.—A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence—

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines; or

(3) is greater than the sentence specified in the applicable guideline range to the extent that the sentence includes a greater fine or term of imprisonment, probation, or supervised release than the maximum established in the guideline range, or includes a more limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) than the maximum established in the guideline range; or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

(b) APPEAL BY THE GOVERNMENT.—The Government may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence—

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is less than the sentence specified in the applicable guideline range to the extent that the sentence includes a lesser fine or term of imprisonment, probation, or supervised release than the minimum established in the guideline range, or includes a less limiting condition of probation or supervised release

under section 3563(b)(6) or (b)(11) than the minimum established in the guideline range; or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

The Government may not further prosecute such appeal without the personal approval of the Attorney General, the Solicitor General, or a deputy solicitor general designated by the Solicitor General.

(c) PLEA AGREEMENTS.—In the case of a plea agreement that includes a specific sentence under rule 11(e)(1)(C) of the Federal Rules of Criminal Procedure—

(1) a defendant may not file a notice of appeal under paragraph (3) or (4) of subsection (a) unless the sentence imposed is greater than the sentence set forth in such agreement; and

(2) the Government may not file a notice of appeal under paragraph (3) or (4) of subsection (b) unless the sentence imposed is less than the sentence set forth in such agreement.

(d) RECORD ON REVIEW.—If a notice of appeal is filed in the district court pursuant to subsection (a) or (b), the clerk shall certify to the court of appeals—

(1) that portion of the record in the case that is designated as pertinent by either of the parties;

(2) the presentence report; and

(3) the information submitted during the sentencing proceeding.

(e) CONSIDERATION.—Upon review of the record, the court of appeals shall determine whether the sentence—

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is outside the applicable guideline range, and is unreasonable, having regard for—

(A) the factors to be considered in imposing a sentence, as set forth in chapter 227 of this title; and

(B) the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553(c); or

(4) was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable.

The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous and shall give due deference to the district court's application of the guidelines to the facts.

(f) DECISION AND DISPOSITION.—If the court of appeals determines that the sentence—

(1) was imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, the court shall remand the case for further sentencing proceedings with such instructions as the court considers appropriate;

(2) is outside the applicable guideline range and is unreasonable or was imposed for an offense for which there is no applicable sentencing guideline and is plainly

unreasonable, it shall state specific reasons for its conclusions and—

(A) if it determines that the sentence is too high and the appeal has been filed under subsection (a), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate;

(B) if it determines that the sentence is too low and the appeal has been filed under subsection (b), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate;

(3) is not described in paragraph (1) or (2), it shall affirm the sentence.

(g) APPLICATION TO A SENTENCE BY A MAGISTRATE.—An appeal of an otherwise final sentence imposed by a United States magistrate may be taken to a judge of the district court, and this section shall apply (except for the requirement of approval by the Attorney General or the Solicitor General in the case of a Government appeal) as though the appeal were to a court of appeals from a sentence imposed by a district court.

(h) GUIDELINE NOT EXPRESSED AS A RANGE.—For the purpose of this section, the term "guideline range" includes a guideline range having the same upper and lower limits.

3. Section 1B1.3 of the United States Sentencing Guidelines provides in relevant part:

(a) Chapters Two (Offense Conduct) and Three (Adjustments). Unless otherwise specified, (i) the base offense level where the guideline specifies more than one base offense level, (ii) specific offense characteristics and (iii) cross references in Chapter Two, and (iv) adjustments in Chapter Three, shall be determined on the basis of the following:

(1) (A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and

(B) in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity,

that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense;

(2) solely with respect to offenses of a character for which §3D1.2(d) would require grouping of multiple counts, all acts and omissions

described in subdivisions (1)(A) and (1)(B) above that were part of the same course of conduct or common scheme or plan as the offense of conviction;

(3) all harm that resulted from the acts and omissions specified in subsections (a)(1) and (a)(2) above, and all harm that was the object of such acts and omissions; and

(4) any other information specified in the applicable guideline.

4. Section 3D1 of the United States Sentencing Guidelines provides :

§ 3D1.1 Procedure for Determining Offense Level on Multiple Counts

(a) When a defendant has been convicted of more than one count, the court shall:

(1) Group the counts resulting in conviction into distinct Groups of Closely Related Counts ("Groups") by applying the rules specified in §3D1.2.

(2) Determine the offense level applicable to each Group by applying the rules specified in §3D1.3.

(3) Determine the combined offense level applicable to all Groups taken together by applying the rules specified in § 3D1.4.

(b) Exclude from the application of §§3D1.2-3D1.5 any count for which the statute (1)

specifies a term of imprisonment to be imposed; and (2) requires that such term of imprisonment be imposed to run consecutively to any other term of imprisonment. Sentences for such counts are governed by the provisions of §5G1.2(a).

§ 3D1.2. Groups of Closely Related Counts

All counts involving substantially the same harm shall be grouped together into a single Group. Counts involve substantially the same harm within the meaning of this rule:

(a) When counts involve the same victim and the same act or transaction.

(b) When counts involve the same victim and two or more acts or transactions connected by a common criminal objective or constituting part of a common scheme or plan.

(c) When one of the counts embodies conduct that is treated as a specific offense characteristic in, or other adjustment to, the guideline applicable to another of the counts.

(d) When the offense level is determined largely on the basis of the total amount of harm or loss, the quantity of a substance involved, or some other measure of aggregate harm, or if the offense behavior is ongoing or continuous in nature and the offense guideline is written to cover such behavior.

Offenses covered by the following guidelines are to be grouped under this subsection:

§§ 2B1.1, 2B1.3, 2B4.1, 2B5.1, 2B5.3, 2B6.1;
§§ 2C1.1, 2C1.2, 2C1.7;
§§ 2D1.1, 2D1.2, 2D1.5, 2D1.11, 2D1.13;
§§ 2E4.1, 2E5.1;
§§ 2F1.1, 2F1.2;
§ 2K2.1;
§§ 2L1.1, 2L2.1;
§ 2N3.1;
§ 2Q2.1;
§ 2R1.1;
§§ 2S1.1, 2S1.2, 2S1.3;
§§ 2T1.1, 2T1.4, 2T1.6, 2T1.7, 2T1.9, 2T2.1, 2T3.1.

Specifically excluded from the operation of this subsection are:

all offenses in Chapter Two, Part A;
§§ 2B2.1, 2B2.3, 2B3.1, 2B3.2, 2B3.3;
§ 2C1.5;
§§ 2D2.1, 2D2.2, 2D2.3;
§§ 2E1.3, 2E1.4, 2E2.1;
§§ 2G1.1, 2G2.1;
§§ 2H1.1, 2H2.1, 2H4.1;
§§ 2L2.2, 2L2.5;
§§ 2M2.1, 2M2.3, 2M3.1, 2M3.2, 2M3.3, 2M3.4, 2M3.5, 2M3.9;
§§ 2P1.1, 2P1.2, 2P1.3.

For multiple counts of offenses that are not listed, grouping under this subsection may or may not be appropriate; a case-by-case

determination must be made based upon the facts of the case and the applicable guidelines (including specific offense characteristics and other adjustments) used to determine the offense level.

Exclusion of an offense from grouping under this subsection does not necessarily preclude grouping under another subsection.

§ 3D1.3 Offense Level Applicable to Each Group of Closely Related Counts

Determine the offense level applicable to each of the Groups as follows:

(a) In the case of counts grouped together pursuant to § 3D1.2(a)-(c), the offense level applicable to a Group is the offense level, determined in accordance with Chapter Two and Parts A, B, and C of Chapter Three, for the most serious of the counts comprising the Group, *i.e.*, the highest offense level of the counts in the Group.

(b) In the case of counts grouped together pursuant to § 3D1.2(d), the offense level applicable to a Group is the offense level corresponding to the aggregated quantity, determined in accordance with Chapter Two and Parts A, B and C of Chapter Three. When the counts involve offenses of the same general type to which different guidelines apply (*e.g.*, theft and fraud), apply the offense guideline that produces the highest offense level.

§ 3D1.4. Determining the Combined Offense Level

The combined offense level is determined by taking the offense level applicable to the Group with the highest offense level and increasing that offense level by the amount indicated in the following table:

Number of Units	Increase in Offense Level
1	none
1 1/2	add 1 level
2	add 2 levels
2 1/2 – 3	add 3 levels
3 1/2 – 5	add 4 levels
More than 5	add 5 levels.

In determining the number of Units for purposes of this section:

(a) Count as one Unit the Group with the highest offense level. Count one additional Unit for each Group that is equally serious or from 1 to 4 levels less serious.

(b) Count as one-half Unit any Group that is 5 to 8 levels less serious than the Group with the highest offense level.

(c) Disregard any Group that is 9 or more levels less serious than the Group with the highest offense level. Such Groups will not increase the applicable offense level but may provide a reason for sentencing at the higher end of the sentencing range for the applicable offense level.

§ 3D1.5. Determining the Total Punishment

Use the combined offense level to determine the appropriate sentence in accordance with the provisions of Chapter Five.

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5. Chapter Five, Part A, of the United States Sentencing Guidelines provides:

The Sentencing Table used to determine the guideline range follows:

SENTENCING TABLE

(in months of imprisonment)

	Offense Level	Criminal History Category (Criminal History Points) I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
	1	0-6	0-6	0-6	0-6	0-6	0-6
	2	0-6	0-6	0-6	0-6	0-6	1-7
	3	0-6	0-6	0-6	0-6	2-8	3-9
	4	0-6	0-6	0-6	2-8	4-10	6-12
Zone A	5	0-6	0-6	1-7	4-10	6-12	9-15
	6	0-6	1-7	2-8	6-12	9-15	12-18
	7	0-6	2-8	4-10	8-14	12-18	15-21
	8	0-6	4-10	6-12	10-16	15-21	18-24
Zone B	9	4-10	6-12	8-14	12-18	18-24	21-27
	10	6-12	8-14	10-16	15-21	21-27	24-30
Zone C	11	8-14	10-16	12-18	18-24	24-30	27-33
	12	10-16	12-18	15-21	21-27	27-33	30-37
	13	12-18	15-21	18-24	24-30	30-37	33-41
	14	15-21	18-24	21-27	27-33	33-41	37-46
	15	18-24	21-27	24-30	30-37	37-46	41-51
	16	21-27	24-30	27-33	33-41	41-51	46-57
	17	24-30	27-33	30-37	37-46	46-57	51-63
	18	27-33	30-37	33-41	41-51	51-63	57-71
	19	30-37	33-41	37-46	46-57	57-71	63-78
	20	33-41	37-46	41-51	51-63	63-78	70-87
	21	37-46	41-51	46-57	57-71	70-87	77-96
	22	41-51	46-57	51-63	63-78	77-96	84-105
	23	46-57	51-63	57-71	70-87	84-105	92-115
	24	51-63	57-71	63-78	77-96	92-115	100-125
	25	57-71	63-78	70-87	84-105	100-125	110-137
	26	63-78	70-87	78-97	92-115	110-137	120-150
Zone D	27	70-87	78-97	87-108	100-125	120-150	130-162
	28	78-97	87-108	97-121	110-137	130-162	140-175
	29	87-108	97-121	108-135	121-151	140-175	151-188
	30	97-121	108-135	121-151	135-168	151-188	168-210
	31	108-135	121-151	135-168	151-188	168-210	188-235
	32	121-151	135-168	151-188	168-210	188-235	210-262
	33	135-168	151-188	168-210	188-235	210-262	235-293
	34	151-188	168-210	188-235	210-262	235-293	262-327
	35	168-210	188-235	210-262	235-293	262-327	292-365
	36	188-235	210-262	235-293	262-327	292-365	324-405
	37	210-262	235-293	262-327	292-365	324-405	360-life
	38	235-293	262-327	292-365	324-405	360-life	360-life
	39	262-327	292-365	324-405	360-life	360-life	360-life
	40	292-365	324-405	360-life	360-life	360-life	360-life
	41	324-405	360-life	360-life	360-life	360-life	360-life
	42	360-life	360-life	360-life	360-life	360-life	360-life
	43	life	life	life	life	life	life

6. The Introductory Commentary to Chapter Three, Part D, of the United States Sentencing Guidelines provides:

This Part provides rules for determining a single offense level that encompasses all the counts of which the defendant is convicted. The single, "combined" offense level that results from applying these rules is used, after adjustment pursuant to the guidelines in subsequent parts, to determine the sentence. These rules have been designed primarily with the more commonly prosecuted federal offenses in mind.

The rules in this Part seek to provide incremental punishment for significant additional criminal conduct. The most serious offense is used as a starting point. The other counts determine how much to increase the offense level. The amount of the additional punishment declines as the number of additional offenses increases.

Some offenses that may be charged in multiple-count indictments are so closely intertwined with other offenses that conviction for them ordinarily would not warrant increasing the guideline range. For example, embezzling money from a bank and falsifying the related records, although legally distinct offenses, represent essentially the same type of wrongful conduct with the same ultimate harm, so that it would be more appropriate to treat them as a single offense for purposes of sentencing. Other offenses, such as an assault causing bodily injury to a teller during a bank robbery, are so closely related to the more serious offense that it would be appropriate to treat them as part of the more serious offense, leaving the sentence enhancement to result from application of a specific offense characteristic.

In order to limit the significance of the formal charging decision and to prevent multiple punishment for substantially identical offense conduct, this Part provides rules for grouping offenses together. Convictions on multiple counts do not result in a sentence enhancement unless they represent additional conduct that is not otherwise accounted for by the guidelines. In essence, counts that are grouped together are treated as constituting a single offense for purposes of the guidelines.

Some offense guidelines, such as those for theft, fraud and drug offenses, contain provisions that deal with repetitive or ongoing behavior. Other guidelines, such as those for assault and robbery, are oriented more toward single episodes of criminal behavior. Accordingly, different rules are required for dealing with multiple-count convictions involving these two different general classes of offenses. More complex cases involving different types of offenses may require application of one rule to some of the counts and another rule to other counts.

Some offenses, *e.g.*, racketeering and conspiracy, may be "composite" in that they involve a pattern of conduct or scheme involving multiple underlying offenses. The rules in this Part are to be used to determine the offense level for such composite offenses from the offense level for the underlying offenses.

Essentially, the rules in this Part can be summarized as follows: (1) If the offense guidelines in Chapter Two base the offense level primarily on the amount of money or quantity of substance involved (*e.g.*, theft, fraud, drug trafficking, firearms dealing), or otherwise contain provisions dealing with repetitive or ongoing misconduct (*e.g.*, many environmental offenses), add the numerical quantities and apply the

pertinent offense guideline, including any specific offense characteristics for the conduct taken as a whole. (2) When offenses are closely interrelated, group them together for purposes of the multiple-count rules, and use only the offense level for the most serious offense in that group. (3) As to other offenses (*e.g.*, independent instances of assault or robbery), start with the offense level for the most serious count and use the number and severity of additional counts to determine the amount by which to increase that offense level.

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IN THE

Supreme Court of the United States

PAUL L. GLOVER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

Page

A. The Government Agrees That The Seventh Circuit's Requirement Of "Significant" Prejudice Is Constitutionally Insupportable And That 6 To 21 Additional Months Imprisonment Caused By Counsel's Ineffective Assistance Satisfies The *Strickland* Prejudice Test 2

B. This Court Should Remand To The Lower Courts To Consider The Government's New Arguments, Which Were Not Raised Below, Addressed By The Courts Below, Or Encompassed Within The Question Presented By The Petition For Certiorari .. 4

1. Government Arguments Below 5

2. Decisions Below 5

3. Petition for Certiorari 6

4. Application of Supreme Court Precedent 7

C. Should This Court Review The Government's New Arguments, It Will Find Them Without Merit. 12

1. Deficient Performance Argument 12

2. *Wilson* Argument 16

3. Recalculation Argument 19

Conclusion 20

TABLE OF AUTHORITIES

Cases — Page

Air Courier Conference of America v. American Postal Workers Union, 498 U.S. 517 (1991) 12
Argersinger v. Hamlin, 407 U.S. 25 (1972) 6
Braxton v. United States, 500 U.S. 344 (1991) 10
Bray v. Alexandria Women's Health Clinic, 506 U.S. 263 (1993) 7
Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984) 11
Cardinale v. Louisiana, 394 U.S. 437 (1969) 8
Delta Air Lines, Inc. v. August, 450 U.S. 346 (1981) 7
DSC Communications Corp. v. Next Level Communications, 107 F.3d 322 (5th Cir. 1977) 16
Duignan v. United States, 274 U.S. 195 (1927) 8
Fontaine v. United States, 411 U.S. 213 (1973) 14
Gen. Accident Ins. Co. of America v. Gonzalez, 86 F.3d 673 (7th Cir. 1996) 17
Holland v. McGinnis, 963 F.2d 1044 (7th Cir. 1992) 16
Holly Farms Corp. v. Nat'l Labor Relations Bd., 517 U.S. 392 (1996) 7
Irvine v. California, 347 U.S. 128 (1954) 10
Koon v. United States, 518 U.S. 81 (1996) 9
Lawn v. United States, 355 U.S. 339 (1958) 7
Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374 (1995) 11
Lockhart v. Fretwell, 506 U.S. 364 (1993) 2, 3
Microsoft Corp. v. United States, No. 00-139 & 00-261, 2000 WL 1052937 (Sept. 26, 2000) 8
Pennsylvania Dept. of Corrections v. Yeskey, 524 U.S. 206 (1998) 7
Strickland v. Washington, 466 U.S. 668 (1984) ..... *passim*
Taylor v. Freeland & Kronz, 503 U.S. 638 (1992) 7, 8

TABLE OF AUTHORITIES—Continued

Page

United States v. Adams, 74 F.3d 1093 (11th Cir. 1996) 14, 17
United States v. Compton, 82 F.3d 179 (7th Cir. 1996) 17
United States v. Cusumano, 943 F.2d 305 (3d Cir. 1991) 13, 17, 18
United States v. Emerson, 128 F.3d 557 (7th Cir. 1997) 17
United States v. Leonard, 61 F.3d 1181 (5th Cir. 1995) 13, 17
United States v. Massey, 48 F.3d 1560 (10th Cir. 1995) 13
United States v. Mullens, 65 F.3d 1560 (11th Cir. 1995) 14, 17
United States v. Sterner, 23 F.3d 250 (9th Cir. 1994) 16
United States v. Walker, 112 F.3d 163 (4th Cir. 1997) 17
United States v. Wilson, 98 F.3d 281 (7th Cir. 1996) ..... *passim*
United States v. Wilson, 131 F.3d 1250 (7th Cir. 1997) 2, 9, 13, 19, 20
Williams v. Taylor, 120 S. Ct. 1495 (2000) 3
Youakim v. Miller, 425 U.S. 231 (1976) 7
Yee v. City of Escondido, 503 U.S. 519 (1992) 11

Statutes

28 U.S.C. § 2255 14

Rules and Regulations

65 Fed. Reg. 50,034 (Aug. 16, 2000) 10
U.S.S.G. § 3D1.2 *et seq.* ..... *passim*
FED. R. APP. P. 28(j) 16

TABLE OF AUTHORITIES—Continued

Other Authorities — Page

Brief of the United States, *Glover v. United States*, 182 F.3d 921 (7th Cir. 1999) (No. 98-4021) 5

Brief of the United States in Opposition to Certiorari, *Riley v. United States*, filed February 17, 2000 (No. 99-920) 10

Stern, Gressman, Shapiro & Geller, *Supreme Court Practice* (7th ed., 1993) 8

U.S. Sentencing Commission Staff, FEDERAL SENTENCING GUIDELINES MANUAL (1995 ed.), Appendix E, "Questions Most Frequently Asked About the Sentencing Guidelines" 18

I

Respondent United States concedes that the Seventh Circuit was incorrect to require that a Section 2255 petitioner demonstrate a "significant" increase in his sentence to satisfy the prejudice prong of the test for establishing ineffective assistance of counsel. The Government agrees with Mr. Glover that there is no basis for adding a "significant" prejudice requirement to the test set out in *Strickland v. Washington*, 466 U.S. 668 (1984). Thus, the Government also agrees with Mr. Glover concerning the only issue raised by his petition to this Court—that the district court and court of appeals erred below in dismissing petitioner's Section 2255 motion on the grounds that 6 to 21 additional months in prison was not "sufficiently significant" to establish prejudice under the ineffective assistance of counsel standard. *See* Resp. Br. 7-9, 11-23.

Although the Government acknowledges the error in the proceedings below, it now argues for affirmance based on a variety of new and different grounds. The Government asserts that this Section 2255 action should be dismissed because petitioner fails the "deficient performance" prong of *Strickland* and that Mr. Glover was not actually prejudiced by his counsel's performance. Yet, these arguments were never raised by the Government in the court of appeals. In addition, the district court and the court of appeals never addressed these grounds for affirmance. These new Government arguments also are not encompassed within the questions on which this Court granted certiorari. Moreover, the Government's new arguments involve complicated issues of interpreting Seventh Circuit and Sentencing Guidelines law which are better left for the lower courts in the first instance. Accordingly, this Court should reverse based on the Government's confession of error relating to the Seventh Circuit's "significant" prejudice requirement and remand the case for the lower courts to address the Government's new arguments for affirmance.

Furthermore, even were this Court to disregard its own rules and procedures and choose to reach the Government's new arguments, it should conclude that they lack merit. The Government's argument regarding performance should be rejected because Glover's counsel was plainly deficient in failing to assert case law to the district court supporting grouping kickback and money laundering offenses under the Sentencing Guidelines and in failing to urge this grouping issue on appeal. In addition, his counsel's failure to bring the controlling case of *United States v. Wilson*, 98 F.3d 281 (7th Cir. 1996), to the attention of the court of appeals clearly fell below any objective standard of reasonableness. The Government's new arguments regarding the prejudice prong also should be rejected. The Government's argument that this Court should overrule *Wilson* is without force and contrary to a sound interpretation of the Sentencing Guidelines. Furthermore, the Government's new theory that application of the *Wilson* decision would lead to an increase in Mr. Glover's sentence was rejected in a subsequent Seventh Circuit decision, *United States v. Wilson*, 131 F.3d 1250 (7th Cir. 1997) ("*Wilson II*").

II

A. The Government Agrees That The Seventh Circuit's Requirement Of "Significant" Prejudice Is Constitutionally Insupportable And That 6 To 21 Additional Months Imprisonment Caused By Counsel's Ineffective Assistance Satisfies The *Strickland* Prejudice Test

The Government now states that the court of appeals "erred in holding that a defendant could show 'prejudice' for an ineffective assistance of counsel claim only if, but for counsel's error, the defendant would have received a 'significant' sentencing reduction." Resp. Br. 8. As the Government notes, the Seventh Circuit incorrectly relied on this Court's decision in *Lockhart v. Fretwell*, 506 U.S. 364 (1993), which the circuit court understood to modify the

Strickland prejudice analysis[1] by requiring a fundamentally unfair or unreliable result (*i.e.*, a significantly longer sentence). This Court recently rejected that understanding of *Lockhart*, explaining in *Williams v. Taylor*, 120 S. Ct. 1495, 1513 (2000), that *Lockhart* "do[es] not justify a departure from straightforward application of *Strickland*." *See* Resp. Br. 8-9, 18-20. The Government also concludes that the Seventh Circuit's test has proved "unworkable," with "no clear or principled lines" for determining when an undeserved imprisonment due to counsel's error is "significant." Resp. Br. 9, 21-22. Thus, as the analysis set forth by the Government confirms, the Seventh Circuit's "significant" prejudice test cannot be justified and should be overturned.

The parties therefore agree that the court of appeals erred in dismissing Mr. Glover's Section 2255 motion on the ground that 6 to 21 additional months in prison was not sufficiently "significant" to demonstrate the requisite prejudice. As discussed in the next section, this "significant" prejudice test was the sole basis for the decisions of the district court and court of appeals and the sole issue presented in the petition for certiorari to this Court. Accordingly, if the Court agrees with the parties that the Seventh Circuit committed error in its application of a "significant" prejudice test, this Court should reverse and remand for the court of appeals to address, as it deems appropriate, the additional grounds for dismissal of the Section 2255 action that the Government now seeks to assert.

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[1] *Strickland* provides that a defendant satisfies the prejudice prong of the ineffectiveness test where he shows a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 694 (1984).

B. This Court Should Remand To The Lower Courts To Consider The Government's New Arguments, Which Were Not Raised Below, Addressed By The Courts Below, Or Encompassed Within The Question Presented By The Petition For Certiorari

The Government offers a potpourri of new grounds for affirming the court of appeals' dismissal of Mr. Glover's Section 2255 motion. Resp. Br. 25-48. First, the Government maintains that Mr. Glover's counsel did not perform ineffectively in violation of the "deficient performance" prong of *Strickland*. The Government contends that Mr. Glover's counsel performed reasonably and competently when he did not present written argument or case law supporting the grouping of kickback and money laundering offenses to the district court and did not urge this grouping issue in the appeal to the circuit court. Second, the Government argues that counsel's failure to assert the controlling decision of *United States v. Wilson*, 98 F.3d 281 (7th Cir. 1996), was not prejudicial because this Court should overrule *Wilson*'s holding concerning the grouping together of kickback and money laundering offenses under Sentencing Guidelines § 3D1.2. Lastly, the Government contends that Mr. Glover cannot demonstrate prejudice because, even under *Wilson*, if one "properly" recalculates Glover's sentence under the Sentencing Guidelines, the sentence would be longer than the 84 months that Mr. Glover received.

None of these assorted arguments for affirmance are properly before this Court. They were not raised below, addressed below, or presented by the petition for certiorari. Accordingly, under the well-established practices of this Court, this case should be remanded to allow the parties the opportunity to more fully brief these issues and to allow the lower courts to interpret their own precedent as applied to the specific facts of this case.

1. *Government Arguments Below.* In connection with the instant Section 2255 action, the Government never argued any of these alternative grounds in the court of appeals.[2] Nowhere in its brief to the Seventh Circuit did the Government contend that Mr. Glover could not satisfy the first prong of *Strickland* because his counsel did not perform deficiently. Nowhere did the Government contend that the Seventh Circuit had wrongly decided *Wilson* and should revisit that precedent. Nowhere did the Government contend that Mr. Glover would have received an even greater sentence had he prevailed on the grouping issue. Rather, the United States argued only one ground to the court of appeals — that Mr. Glover's claim of a two-offense level change, or 6 to 21 additional months in prison, failed to satisfy the "significant" prejudice requirement established by the Seventh Circuit.[3]

2. *Decisions Below.* Not surprisingly in light of the single argument put forward by the Government, the court of appeals relied on the "significant" prejudice test and did not address any other grounds for affirmance. The district court likewise had not reached any other arguments relating to Mr. Glover's Section 2255 motion. Instead, both courts dismissed the Section 2255 motion on the single ground that Mr. Glover could not satisfy the prejudice prong of *Strickland* because 6 to 21 additional months in prison caused by counsel's ineffectiveness was not sufficiently "significant" under Seventh Circuit law. These lower courts concluded that Mr. Glover failed the "significant" prejudice standard of the

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[2] A copy of the Brief of the United States, *Glover v. United States*, 182 F.3d 921 (7th Cir. 1999) (No. 98-4021) is attached as Appendix A to this Reply Brief.

[3] Thus, the Government characterized the issue for appeal as "[w]hether the potential effect on Glover's sentence of his attorneys' claimed deficient performance can satisfy the prejudice component of an ineffective assistance of counsel claim." Brief of United States, filed February 23, 1999, at 1 (Appendix A, at 6a).

Seventh Circuit, and therefore they did not find it necessary to reach any other grounds. J.A. 53 ("Even if we were to assume that Glover's attorneys performed inadequately, the second prong, prejudice, is missing here."); J.A. 45 ("Because it is held that Glover does not satisfy the prejudice requirement, it is unnecessary to consider the issue of deficient performance.").

3. *Petition for Certiorari.* Because the decisions of both the court of appeals and district court relied solely on the "significant" prejudice standard adopted by the Seventh Circuit, and because this was the only ground argued by the Government in the appeals court, Mr. Glover's petition for certiorari focused solely on this "significant" prejudice issue. Petitioner's "Question Presented" addressed only whether an additional 6 to 21 months in prison was "insufficient to satisfy the 'prejudice' prong of *Strickland v. Washington*." Petition for a Writ of Certiorari, at i. Thus, the petition was aimed at the single issue—the correctness of the Seventh Circuit's "significant" prejudice standard. Petitioner argued that this "significant" prejudice standard was contrary to Supreme Court precedent, conflicted with decisions from other circuit courts, led to arbitrary and inconsistent results, and presented an issue of recurring importance.

Unfortunately, unlike its more forthright brief on the merits, the Government declined to confess error in opposing certiorari. In its brief in opposition, the Government argued that Mr. Glover's case did not warrant review because there was no split of authority among the circuit courts relating to the "significant" prejudice requirement. Brief of United States, filed May 22, 2000, at 10-13. The Government also argued that the Seventh Circuit's "significant" prejudice test was not inconsistent with Sixth Amendment cases such as *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972). *Id.* at 10 n.4. In addition, the Government argued that the grant of certiorari was "premature" in light of more recent Fifth Circuit and

Supreme Court decisions discussing the prejudice standard. *Id.* at 14. Although the Government contended that certiorari should be denied because Mr. Glover's counsel had not been deficient in failing to anticipate *Wilson*, *id.* at 7-9, the Government never argued that *Wilson* should be overruled or that Mr. Glover would suffer an increase in his prison sentence if he prevailed on the grouping issue.

4. *Application of Supreme Court Precedent.* In these circumstances, this Court's procedures and practices provide that the Court should not reach the Government's sundry new grounds for affirmance but should remand them for consideration by the lower courts. Supreme Court Rule 14.1(a) states that "[o]nly the questions set out in the petition [for certiorari], or fairly included therein, will be considered by the Court,"[4] and Rule 24.1(a) notes that a brief on the merits should not "raise additional questions or change the substance of the questions already presented" in the petition. It also is well settled that "ordinarily this Court does not decide questions not raised or resolved in the lower court[s]." *Taylor v. Freeland & Kronz*, 503 U.S. 638, 646 (1992); *Youakim v. Miller*, 425 U.S. 231, 234 (1976) (per curiam) (same); *see Pennsylvania Dept. of Corrections v. Yeskey*, 524 U.S. 206, 212 (1998) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them."); *Holly Farms Corp. v. Nat'l Labor Relations Bd*, 517 U.S. 392, 400 n.7 (1996) ("We 'generally do not address arguments that were not the basis for the decision below.'"); *Delta Air Lines v. August*, 450 U.S. 346, 362 (1981) (question presented in petition but "not raised in court of appeals is not properly before us"); *Lawn v. United States*, 355 U.S. 339, 362 n.16 (1958) ("Only in

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[4] "[I]t is the petition for certiorari (not the brief in opposition and later briefs) that determines the questions presented . . . ." *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 280 (1993).

exceptional cases will this Court review a question not raised in the court below."); *Duignan v. United States*, 274 U.S. 195, 200 (1927) ("It is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed."). *See also* Stern, Gressman, Shapiro, & Geller, *Supreme Court Practice* (7th ed. 1993), at § 6.26 (and cases cited therein).

Adherence to these rules precluding a respondent from arguing issues which were not presented or decided below or identified by the petition is important "to maintain[ing] the integrity of the process of certiorari." *Taylor v. Freeland & Kronz*, 503 U.S. at 646. As this Court observed:

> The Court decides which questions to consider through well-established procedures; allowing the able counsel who argue before us to alter these questions or to devise additional questions at the last minute would thwart this system.

Id. In addition, injecting new issues into the case at this stage deprives this Court of the benefit of the lower court's refinement and resolution of such issues. *See* Stern, *et al.*, *Supreme Court Practice*, at 343.[5]

This case does not present any exceptional circumstances which justify diverging from this Court's established practice of remanding newly raised issues to the lower courts. Rather, the Government's arguments turn on interpretations of Seventh Circuit law, as well as the application of this circuit law to the specific facts of this case.

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[5] "Questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind." *Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969). *See also Microsoft Corp. v. United States*, No. 00-139 & 00-261, 2000 WL 1052937 (U.S. Sept. 26, 2000) ("A court of appeals proceeding would likely narrow, focus, and initially decide the legal issues now presented here. It would thereby facilitate any later deliberation in this Court.") (Breyer, J., dissenting from denial of direct appeal).

The Government, for example, argues that petitioner's counsel acted reasonably because the grouping issue under § 3D1.2 was not a "clearly stronger" appellate issue than the two issues raised by his counsel on appeal. Resp. Br. 31-32. The comparison of the relative strengths of these appellate issues—which include evidentiary rulings and factual determinations—requires a detailed analysis of governing Seventh Circuit law as well as the relevant facts and rulings in the district court. Similarly, the Government contends that Mr. Glover's counsel was precluded from bringing the controlling decision of *United States v. Wilson*, 98 F.3d 281 (1996), to the Seventh Circuit's attention even though the panel had not yet ruled on Mr. Glover's appeal. This contention involves a quintessential question of the Seventh Circuit's practice which should be left to that court in the first instance. Likewise, the Government alleges that Mr. Glover would be resentenced to an even greater term of imprisonment if the kickback and money laundering offenses were grouped together under *Wilson*. This charge involves not only an elaborate application of the Sentencing Guidelines to Mr. Glover's specific facts, but runs directly counter to the court of appeals' decision in *Wilson II*, 131 F.3d at 1253-54, which held that the Government waives these very arguments by failing to raise them at the original sentencing. Again, the district court and court of appeals are best situated to address these issues of circuit law as applied to Mr. Glover's case.

That this case involves interpretation and application of the Sentencing Guidelines also counsels for remanding the Government's new arguments to the lower courts. This Court has previously recognized that the district courts are in the best position to apply the Sentencing Guidelines to the facts of an individual case. *See Koon v. United States*, 518 U.S. 81 (1996) (adopting abuse of discretion standard for appellate review). This Court also has noted that it should be "restrained and circumspect in using [ ] certiorari power as the primary means of resolving" conflicts on Sentencing

Guidelines interpretation because Congress expressly contemplated that the Sentencing Commission would revise the Guidelines to clarify any conflicting judicial decisions. *Braxton v. United States*, 500 U.S. 344, 348 (1991). In fact, the Sentencing Commission has identified the very grouping issue that the Government urges this Court to review here as one of its policy priorities for clarification in the coming year. 65 Fed. Reg. 50,034 (Aug. 16, 2000) (the Commission's "priorities . . . [for] possible amendments to the guidelines, policy statements, and commentary" include "(ix) [w]hether money laundering and fraud convictions should be grouped together for sentencing under § 3D1.2"). The Government has frequently maintained that, pursuant to *Braxton*, this Court should not review issues relating to interpreting the Sentencing Guidelines.[6] It, therefore, is inappropriate that, after certiorari is granted, the Government for the first time seeks review of *Wilson* and proposes resentencing calculations by this Court. *See Irvine v. California*, 347 U.S. 128, 129 (1954) ("We disapprove the practice of smuggling additional questions into a case after we grant certiorari. The issues here are fixed by the petition . . .").

The Government has no legitimate excuse for its failure to raise these new arguments for affirmance in the court below.[7]

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[6] *See, e.g.*, Brief of the United States in Opposition to Certiorari at 13, *Riley v. United States*, filed February 17, 2000 (No. 99-920) ("As this Court explained in *Braxton v. United States*, 500 U.S. 344 (1991), conflicts among the court of appeals regarding interpretation of the Sentencing Guidelines generally do not warrant plenary review by this Court. Rather, resolution of such conflicts is best reserved for the Sentencing Commission . . .").

[7] The Government justifies its failure to raise these new arguments in the court of appeals by noting that "the district court's ruling addressed only prejudice." Resp. Br. 24, n.10. The Government also argues in a footnote that its new arguments are nevertheless properly before the Court because they involve the "unitary claim of ineffective assistance of counsel." *Id.* Yet, surely if Mr. Glover were to raise new arguments for why his counsel had been ineffective—*e.g.*, that his lawyer had not objected to a certain jury instruction at trial and had not urged this jury instruction issue on appeal—the Government would not consider this part of a "unitary claim" but instead would adamantly insist that this Court should not consider these new, never-previously-asserted arguments. The United States should not be permitted to escape its failure to raise arguments below by simply rewriting petitioner's certiorari questions using overly broad and inapt general terms.

It has offered no persuasive reason for why this Court should wade into the morass of the Government's complicated new arguments relating to circuit law and the Sentencing Guidelines. The better course here is for this Court to follow its usual procedures: in light of the Government's confession of error on the issue relied on below and raised in the petition for certiorari—the "significant" prejudice standard—this Court should reverse and remand the case to the court of appeals. The lower courts can then determine whether the Government's new arguments have been properly preserved

The cases cited by the Government in support of its view do not argue to the contrary. Resp. Br. 24, n.10. In *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374, 379-80 (1995), the Court found it appropriate to address petitioner's new argument because it "was addressed by the court below" and "fairly embraced within the question set forth in the petition for certiorari." Neither of these elements is present in the instant case. *Lebron* (and the Government) quotes *Yee v. City of Escondido*, 503 U.S. 519 (1992), a case where this Court refused to reach an "important" argument because it was not encompassed by the petition for certiorari and petitioners could not overcome the "heavy presumption" against addressing such a new argument. The Government's citation to *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984), also is unavailing. In *Capital Cities*, the issue considered by the Court had been acknowledged by both the district court and court of appeals, the district court had made findings on all factual issues necessary to resolve the question, and the parties had briefed and argued the question pursuant to an order of the Court. *Id.* at 697.

and, if so, whether these arguments warrant dismissal of the Section 2255 motion.[8]

C. Should This Court Review The Government's New Arguments, It Will Find Them Without Merit.

As discussed above, the Government's new arguments should be addressed by the lower courts in the first instance. Nevertheless, even were this Court to review them, it should find these eleventh-hour Government contentions cannot survive scrutiny.[9]

1. *Deficient Performance Argument.* The Government now asserts that petitioner's counsel did not perform deficiently in the district court and court of appeals because he could not be "clairvoyant and foresee that the Seventh Circuit . . . would adopt a position on grouping favorable to the defense." Resp. Br. 10, 29-34. The Government characterizes the actions of Mr. Glover's counsel as simply a "reasonable tactical decision." *Id.* at 34. The Government, however, fundamentally misapprehends the factual and legal background relating to the grouping issue in Mr. Glover's case.

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> [Respondent] raised this argument for the first time in its brief in opposition to the petition for writ of certiorari. It was not argued to either of the lower courts, and was not considered by either court below in deciding this case. The issue was not raised by ACCA in its petition for writ of certiorari, nor is it encompassed by the questions presented upon which we based our grant of certiorari. Consequently, we decline to decide [this issue].

Air Courier Conference of America v. American Postal Workers Union, 498 U.S. 517, 522-23 (1991).

[9] It should be noted that, because the Government waited until the opposition brief on the merits before this Court, Mr. Glover is constrained by time and space limitations in responding to the Government's various new arguments. These limitations also preclude effective participation of possible amici curiae who might wish to contribute to the Court's consideration of these issues.

Mr. Glover's counsel clearly performed below the professional norm during the district court sentencing process when he failed to file a written response to the Government's position paper[10] and failed to bring to the district court's attention any of the case law supporting the grouping of kickback and money laundering counts under Guidelines § 3D1.2. At the time of the sentencing, several circuit courts had already held that money laundering and fraud activities should be grouped together under the provisions of Guidelines § 3D1.2.[11] Yet, Mr. Glover's counsel never apprised the district court of these cases or their reasoning supporting the grouping of kickback and money laundering offenses.

The Government now asserts that Mr. Glover's counsel never submitted a written response or asserted this case law because of counsel's alleged fears that Mr. Glover would receive an even longer sentence if these offenses were grouped. However, there is no factual support for this Government contention. In the proceedings before the district court, the United States never hinted at a longer sentence, never mentioning any such possibility in its filed position paper or its statements at the sentencing hearing. The Government never challenged, as it was required to do, *see Wilson II*, 131 F.3d at 1250, the value of funds used in the probation office's presentence report for calculating the

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[10] The United States Probation Office made a recommendation in favor of grouping the kickback and money laundering counts pursuant to Sentencing Guidelines § 3D1.2. J.A. 70-71. The Government submitted a written position paper objecting to this grouping recommendations. Mr. Glover's counsel filed no pleadings supporting the presentence report or opposing the Government's position paper.

[11] *See United States v. Leonard*, 61 F.3d 1181, 1186 (5th Cir. 1995); *United States v. Cusumano*, 943 F.2d 305 (3d Cir. 1991); *cf. United States v. Massey*, 48 F.3d 1560, 1568 (10th Cir. 1995) (noting district court's grouping of money laundering and fraud offenses).

offense level with the offenses grouped. Moreover, Mr. Glover's counsel did argue for grouping during the sentencing hearing, albeit weakly and orally only, and without citation to the supporting case law or reference to the reasoning therein. The Government's position now appears to be, in essence, that petitioner's counsel made a "tactical decision" to present a grouping argument but to do so in a haphazard, incompetent fashion. Such a strategy could hardly be deemed "reasonable." A more likely explanation is that Mr. Glover's counsel had not done any research or preparation, had not identified the cases in other circuits supporting grouping, and, consequently, argued inadequately when asked by the district judge to address the Government's objection to grouping the offenses.

There also is no factual basis for the Government's contention that his counsel made a "reasonable tactical decision" to not assert the grouping issue on appeal.[12] The report of the Probation Office had recommended grouping. Along with the several circuit court decisions which Glover's counsel failed to raise at the district court level, an additional court of appeals had found in favor of grouping money laundering and fraud under § 3D1.2 by the time of Mr. Glover's appeal. *See United States v. Mullens*, 65 F.3d 1560 (11th Cir. 1995); *United States v. Adams*, 74 F.3d 1093, 1102 n.12 (11th Cir. 1996). Although the Seventh Circuit had not yet addressed the issue, there was a reasonable likelihood that

[12] At the very least, Mr. Glover is entitled to an evidentiary hearing in the district court to determine if this was truly a tactical decision or whether, as petitioner alleges in his Section 2255 motion, counsel never researched any of the precedent relating to the grouping issue and never was aware of the *Wilson* decision. *See* 28 U.S.C. § 2255 (evidentiary hearing should occur unless "the motion and the files and records of the case *conclusively* show that the [petitioner] is entitled to no relief") (emphasis added); *Fontaine v. United States*, 411 U.S. 213, 215 (1973) (per curiam).

the Seventh Circuit would join the other circuit courts which had concluded that money laundering, when engaged in as part of an effort to conceal an illegal kickback scheme, should be grouped with the kickback offenses under § 3D1.2.

Contrary to the Government's assertion, this grouping issue was a clearly stronger argument than the two claims that Mr. Glover's counsel did assert on appeal. His counsel maintained that the trial judge erroneously refused to admit all of Mr. Glover's testimony from his first trial for clarification purposes. The entirety of this testimony comprised 168 pages. The court of appeals found that Mr. Glover could not demonstrate "the threshold criteria" of relevance for all of Glover's testimony and did not even remotely approach the "abuse of discretion" that he was required to show. J.A. 144-45 (listing numerous reasons why court found this claim to be "wholly unfounded").

Glover's counsel also challenged on appeal the 2-offense level obstruction enhancement that Mr. Glover received for committing perjury at his first trial. This appellate claim, however, had no support in the presentence report, required Mr. Glover to prove that the district judge's factual determination was "clear error," and challenged four specific factual findings by the judge of false statements by Mr. Glover under oath. J.A. 137-138, 145-147. Unlike the grouping issue which prevailed in *Wilson*, the Seventh Circuit easily rejected counsel's perjury arguments. J.A. 147 ("In making these findings [of perjury], the judge has complied in every respect with the [enhancement] requirements [and] we discern no error, clear or otherwise in the judge's factual determinations. . . . [T]his is plainly not a close call.'"). There can be no doubt that the grouping issue was far superior to the claims actually urged by counsel.[13]

[13] The circumstances surrounding counsel's actions on appeal call into serious question his diligence and commitment to Mr. Glover's case.

Furthermore, petitioner's counsel did not act reasonably when he failed to bring the *Wilson* decision to the panel's attention. *Wilson* was on all fours with Mr. Glover's case. Indeed, as the district court noted in its order dismissing Mr. Glover's Section 2255 motion, the Government "concede[d] that *Wilson* would be controlling as to the grouping of Glover's conspiracy, kickback and money laundering offenses." J.A. 44. Federal Rule of Appellate Procedure 28(j) expressly allows for submitting such supplemental authority after written briefing has concluded. Mr. Glover's counsel was obligated to learn of the *Wilson* decision and inform the court of appeals of its relevance to Mr. Glover's case. Given the dispositive nature of the *Wilson* decision to Glover's sentence, the Government misses the mark in contending that the Seventh Circuit would not consider *Wilson* and correct Mr. Glover's faulty sentence.[14]

Glover's counsel initially moved to withdraw as counsel on appeal. This motion was denied by the circuit court. Counsel then moved on at least four occasions for an extension of time before finally filing Mr. Glover's appellate brief. Then, despite the fact that Mr. Glover was convicted in a three-week trial involving complex labor racketeering charges, Mr. Glover's attorney raised only two issues on appeal. Moreover, much of the counsel's brief consists of simply quoting from transcripts. J.A. 120-24.

[14] *See, e.g., DSC Communications Corp. v. Next Level Communications*, 107 F.3d 322, 326 (5th Cir. 1977) (considering issue raised by party in supplemental authority after oral argument; "we are unwilling to ignore this important clarification of the law, and perpetuate incorrect law"); *United States v. Sterner*, 23 F.3d 250, 252 n.3 (9th Cir. 1994) (considering issue raised in supplemental authority "to prevent 'substantial inequity'"); *see also Holland v. McGinnis*, 963 F.2d 1044, 1057 (7th Cir. 1992) ("Of course, the state may advance new grounds if they arise after briefing."); *United States v. Compton*, 82 F.3d 179, 183-84, n.10 (7th Cir. 1996) (addressing controlling case presented as supplemental authority after briefing); *Gen. Accident Ins. Co. of Am. v. Gonzalez*, 86 F.3d 673, 675 & n.2 (7th Cir. 1996) (same).

2. *Wilson Argument.* The Government also argues that it would be an impermissible "windfall" for petitioner to rely on the Seventh Circuit's holding in *Wilson* that grouping is required because *Wilson* was wrongly decided. Resp. Br. 38-44. Although careful never to say so directly, the Government is asking this Court to overrule the Seventh Circuit's interpretation, as well as the interpretation of a number of other circuits, of § 3D1.2 of the Guidelines.[15]

These circuit court decisions are soundly reasoned. Indeed, Mr. Glover would qualify for grouping under three of the subsections of Guidelines § 3D1.2. Because the money laundering was part of the common scheme to conceal the illegal kickbacks, these offenses were aimed at the same victim and therefore qualify for grouping under § 3D1.2(b). *See, e.g., Wilson*, 98 F.3d at 283-84 ("there is intuitive force to the argument that the victim of the fraud is also a victim of the transaction designed to hide or 'cleanse' the funds of which she was defrauded."); *Leonard*, 61 F.3d at 1186 ("the group of targeted victims became the victim of the money laundering activity as well as the fraud scheme . . . [T]he money laundering and fraud constituted part of the same continuing common criminal endeavor").[16] The kickback and

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The only Seventh Circuit case cited by the Government involves a finding of waiver where a party neglected to raise an issue anywhere in its briefs. Resp. Br. 34 (citing *Durham v. Kisak*, 192 F.3d 1104, 1110 (7th Cir. 1999)). *Durham*, however, does not speak to the instant situation where a dispositive ruling on an issue affecting an individual's liberty is issued after briefing but while the case is still pending.

[15] *See, e.g., Wilson*, 98 F.3d at 281, *United States v. Emerson*, 128 F.3d 557, 564-66 (7th Cir. 1997), *United States v. Cusumano*, 943 F.2d 305, 312-13 (3d Cir. 1991); *United States v. Leonard*, 61 F.3d 1181, 1186 (5th Cir. 1995); *United States v. Mullens*, 65 F.3d 1560, 1564 (11th Cir. 1995); *United States v. Adams*, 74 F. 3d 1093, 1102 n.12 (11th Cir. 1996); *United States v. Walker*, 112 F.3d 163, 166-67 (4th Cir. 1997).

[16] *See also United States v. Cusumano*, 943 F.2d at 313 (finding grouping under § 3D1.2(b); "The victim of all offenses in this case was

money laundering offenses also should be grouped under subsection (c) in order to avoid double counting; otherwise, the same $250,000 is counted for calculating the kickback offense level and the money laundering offense level.[17]

The kickback and money laundering offenses also could qualify for grouping under § 3D1.2(d). As the Government itself admits, grouping of money laundering and labor racketeering offenses "might seem appropriate" under the plain language of subsection (d) "because the guidelines for both offenses measure some part of the respective harms in monetary terms." Resp. Br. 42. The Government also must concede that subsection (d) contains a list of offenses "to be grouped" under its provision, and both kickbacks and money laundering are included on that list. *Id.* 42-43. The Government offers no convincing rationale as to why these clear statements by the Sentencing Commission should not end the inquiry. The kickback scheme and the money laundering engaged in as part of the kickback scheme "are 'of the same general type', and the offense level for each 'is determined largely on the basis of the total amount of harm or loss' as subsection (d) envisions." *Wilson*, 98 F.3d at 283 (quoting § 3D1.2(d) and Application Note 6). As a result,

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the [Pension] Fund and its beneficiaries. The evidence demonstrated that the unlawful kickbacks, the embezzlement, the conspiracy, the travel act violations and the money laundering were all part of one overall scheme to obtain money from the Fund and to convert it to the use of [defendants].").

[17] *See* U.S. Sentencing Commission Staff, FEDERAL SENTENCING GUIDELINES MANUAL (1995 ed.) Appendix E, "Questions Most Frequently Asked About the Sentencing Guidelines," Question 65 (concluding that in most cases it was appropriate to group money laundering offenses and drug distribution offenses—offenses far more dissimilar than kickbacks and attendant money laundering—under §§ 3D1.2(a)-(c)).

these offenses should be grouped together under subsection (d).[18]

3. *Recalculation Argument.* The Government also engages in an elaborate Sentencing Guidelines recalculation to show, in its estimation, that Mr. Glover suffered no prejudice because he would have received an even longer sentence if grouping occurred under *Wilson*. Resp. Br. 44-47. The Government attempted this very recalculation on remand in *Wilson*, and was emphatically rebuffed by the Seventh Circuit. *Wilson II*, 131 F.3d at 1250. In *Wilson II*, the court of appeals ruled that the Government's proposed sentencing 'changes' on remand—the same recalculations that it proposes here—should have been raised during the original sentencing. According to *Wilson II*, the Government "could have but did not" make these Guidelines arguments in the original sentencing proceedings, and thereby "waived any reliance" on them. *Id.* at 1253. Mr. Glover's case is identical. In fact, the Probation Office's presentence report regarding Mr. Glover grouped the kickback and money laundering offenses, so the Government had before it the precise calculation of Mr. Glover's sentence based upon the grouping of these offenses in August 1995. J.A. 56-83. Yet, the Government did not object on these grounds. Thus, there is no need for the Government's elaborate recalculation; the Probation Office's presentence report already performed this calculation which upon adoption by the district court at sentencing became the law of the case. Although the

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[18] *See also* Sentencing Guidelines §3D1.2, Application Note 6 ("Subsection (d) likely will be used with the greatest frequency. It provides that most property crimes . . . and other crimes where the guidelines are based primarily on quantity or contemplate continuing behavior are to be grouped together . . . [Offenses] are grouped together under subsection (d) if the offenses are of the same general type and otherwise meet the criteria for grouping under this subsection. . . . The 'same general type' of offense is to be construed broadly . . .").

Government "had every incentive" at the time of sentencing to make the Guidelines arguments on which its new recalculation is based, *Wilson II*, 131 F.3d at 1253, it did not do so. Accordingly, under *Wilson II*, the Government's failure to make these arguments during the original sentencing of Mr. Glover prevents it from reopening these sentencing determinations years later.[19]

As the Government tacitly acknowledges, the Seventh Circuit's waiver holding in *Wilson II* precludes the Government's theory that grouping would lead to a longer recalculated sentence for Mr. Glover. Resp. Br. 47 n. 19. Once again, the Government is compelled to argue that this Court should overrule binding Seventh Circuit precedent. The Government, however, fails to set forth any error on the part of the Seventh Circuit or any explanation as to what makes this procedural issue worthy of review by this Court.

CONCLUSION

Accordingly, the judgment of the court of appeals should be reversed and the case be remanded to the court of appeals.

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[19] The Government's recalculation also is incorrect. If the offenses are grouped under subsections (a) through (c), there is no aggregating of dollar amounts and, therefore, the sentencing range would be decreased and not increased. Even if the offenses are grouped under subsection (d), the Government is mistaken in its inclusion of the entire $1.8 million in commissions as part of the "value of the funds" used for calculating the money laundering offense level. This would be misleading and factually inaccurate (as well as doublecounting) since only $250,000 of $1.8 million was actually 'laundered.' Consequently, the probation office only used the $250,000 in its report when performing this calculation and arriving at a lower offense level. J.A. 67.

In addition, the Government did not object to this finding in the presentence report, and it was so adopted by the district court. J.A. 93. The Government did not claim as an alternate basis for affirmance in the court of appeals that the finding was clearly erroneous. The suggestion that this Court should reconsider this point now, for the first time, should be categorically rejected.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 98-4021

PAUL L. GLOVER,
Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,
Respondent-Appellee.

On Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 97 C 8382—William T. Hart, *Judge*.

BRIEF AND APPENDIX OF THE UNITED STATES

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TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
JURISDICTIONAL STATEMENT	1
STATEMENT OF THE CASE	1
I. Nature of the Case, Course of Proceedings, and Disposition in the Court Below	1
II. Statement of Facts	2
SUMMARY OF ARGUMENT	5
ARGUMENT	6
I. Standard of Review	6
II. The Potential Effect on Glover's Sentence of His Attorney's Claimed Deficient Performance Does Not Satisfy the Prejudice Component of an Ineffective Assistance of Counsel Claim	6
A. *Durrive* and *Martin* Were Not Wrongly Decided	7
1. Background for this Court's Holding in Durrive and Martin	7
2. This Court's Holding in Durrive and Martin	10
3. Response to Glover's Arguments	13
B. Glover Does Not Fall Within Any Exception to *Durrive* and *Martin*	15
C. Glover Has Not Established "Significant" Prejudice as Required by *Durrive* and *Martin*	17
CONCLUSION	20

APPENDIX

September 3, 1998 District Court Memorandum Opinion and Order	A-1

TABLE OF AUTHORITIES

FEDERAL CASES

Cases — Page

Davis v. United States, 1998 WL 142369 (N.D. Ill).....
Durrive v. United States, 4 F.3d 548 (7th Cir. 1993).....
Gonzales v. United States, 967 F. Supp. 326 (N.D.Ill. 1997).....
Lockhart v. Fretwell, 506 U.S. 364 (1993).....
Martin v. United States, 109 F.3d 1177 (7th Cir. 1996) (*en banc*), *cert. denied*, 118 S.Ct. 335 (1997).....
Melvin v. United States, 78 F.3d 327 (7th Cir.),*cert. denied*, 117 S.Ct. 384 (1996).....
Scott v. United States, 997 F.2d 340 (7th Cir. 1993).....
Spriggs v. Collins, 993 F.2d 85 (5th Cir. 1993).....
Stoia v. United States, 109 F.3d 392 (7th Cir. 1997).....
Strickland v. Washington, 466 U.S. 668 (1984).....
Unger v. United States, 8 F.Supp.2d 1151 (E.D.Wis. 1998).....
United States v. Allen, 1997 WL 445823 (N.D.Ill).....
United States v. Dunningan, 507 U.S. 87 (1993).....
United States v. Glover, 101 F.3d 1183 (7th Cir. 1996).....
United States v. Grayson, 438 U.S. 41 (1978).....
United States v. Lloyd, 983 F.Supp. 738 (N.D.Ill. 1997).....
United States v. Lombard, 5 F.3d 568 (1st Cir. 1993).....

United States v. Mosely, 967 F.2d 242 (7th Cir. 1992).....
United States v. Smith, 13 F.3d 1421 (10th Cir.), *cert. denied*, 513 U.S. 878 (1994).....
United States v. Spriggs, 988 F.2d 746 (7th Cir. 1993).....
United States v. Tai, 972 F.Supp. 434 (N.D.Ill. 1997).....
United States v. Taylor, 984 F.2d 298 (9th Cir. 1993).....
United States v. Timmreck, 441 U.S. 780 (1979)...
United States v. Wilson, 98 F.3d 281 (7th Cir. 1996).....
Williams v. Oklahoma, 358 U.S. 576 (1959).....

FEDERAL STATUTES

18 U.S.C. § 1954.....
18 U.S.C. § 1956.....
18 U.S.C. § 1962.....
26 U.S.C. § 7206.....
28 U.S.C. § 2255.....

OTHER AUTHORITIES

U.S.S.G. § 3D1.2(d).....
U.S.S.G. § 3D1.4(c).....
U.S.S.G. § 5K2.6 .....

JURISDICTIONAL STATEMENT

The jurisdictional statement of Petitioner-Appellant is complete and correct.

ISSUE PRESENTED FOR REVIEW

Whether the potential effect on Glover's sentence of his attorneys' claimed deficient performance can satisfy the prejudice component of an ineffective assistance of counsel claim.

STATEMENT OF THE CASE

I. Nature of the Case, Course of Proceedings, and Disposition in the Court Below

Following a jury trial, Petitioner-Appellant Paul L. Glover was convicted of one count of a conspiracy in violation of 18 U.S.C. § 1962(d) (RICO); eleven counts of soliciting and receiving kickbacks in violation 18 U.S.C. § 1954; two counts of money laundering in violation of 18 U.S.C. § 1956(a)(1)(B)(i); and four counts of tax evasion in violation of 26 U.S.C. § 7206. On September 21, 1995, Glover "was sentenced to concurrent terms of incarceration with the longest term being 84 months." Op. at 1.[1] Glover's conviction and sentence were affirmed on direct appeal in which he was represented by the same attorneys who represented him at trial. *United States v. Glover*, 101 F.3d 1183 (7th Cir. 1996).

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[1] References in this brief are as follows:

R. - Original Record on Appeal
S.Tr. - September 21, 1995 Sentencing Transcript
Br. - Glover's Brief on Appeal
Op. - September 3, 1998 District Court Memorandum Opinion and Order (Because the copy of the district court's September 3, 1998 Memorandum and Order in Appellant's Appendix only contains four pages of the district court's eight page opinion, a full copy of the district court's opinion is included in an Appendix to this brief.)

On November 26, 1997, Glover filed a Motion to Correct Sentence pursuant to 28 U.S.C. § 2255. R. 1. The district court denied his petition in a memorandum opinion that was entered on the docket on September 3, 1998. R. 7-9. On October 19, 1998, Glover filed a notice of appeal. R. 10. On October 22, 1998, the district court certified the appealability of Glover's claim of ineffective assistance of counsel. R. 13.

II. Statement of Facts

Petitioner-Appellant, Paul L. Glover, was convicted after a jury trial of the offenses of RICO conspiracy, money laundering, soliciting and receiving kickbacks, and tax evasion. In summary, Glover, formerly the Vice-President and General Counsel of the Chicago Truck Drivers, Helpers and Warehouse Workers Union (Independent), solicited and received kickbacks totaling approximately $326,875 as a result of investments he helped arrange from the Union's pension and health and welfare funds. Glover also arranged for the laundering of approximately $150,000 of these proceeds to conceal their illegal source and reported none of the proceeds from these kickbacks on his federal income tax returns. *Glover*, 101 F.3d at 1185-88.

Glover's Presentence Investigation Report ["PIR"] recommended that the money laundering and kickback offenses be grouped together. S.Tr. at 3. At the sentencing hearing, the United States argued that Glover's money laundering and kickback offenses should be grouped separately under the Sentencing Guidelines. S.Tr. at 2-3. Glover's counsel objected to the separate grouping of the money laundering and kickback offenses and argued that they should be grouped together as they had been in the PIR. In response to the district court's comment that the "probation officer [had] grouped all of the offenses together rather than separately," Glover's counsel responded:

> No, your Honor. I just think it's appropriate. It's one common—if the jury was and did believe that it was one joint effort by Johnson and Mr. Glover. I think that all of the transactions that the government asserts should be considered individually ought not be considered individually. I think there [sic] appropriately grouped [referring to their being grouped together in the PIR].
>
> S.Tr. at 3-4.

The district court denied Glover's objection and held that the money laundering and kickback offenses should be grouped separately. S.Tr. at 4. In so holding, the district court noted that the Seventh Circuit had not yet ruled on the issue of the grouping of money laundering and kickback offenses, but that other circuits, including the First, Fourth, Ninth, Tenth and Eleventh "had held in similar fact situations that they should not be grouped." S.Tr. at 4. *See. e.g., United States v. Lombardi*, 5 F.3d 568, 570-71 (1st Cir. 1993) (grouping money laundering separately from conspiracy/mail fraud); *United States v. Taylor*, 984 F.2d 298, 303 (9th Cir. 1993) (grouping money laundering separately from wire fraud); *United States v. Smith*, 13 F.3d 1421, 1428 (10th Cir.) (grouping money laundering separately from mail fraud) , *cert. denied*, 513 U.S. 878 (1994). As a result of this separate grouping, Glover's total offense level was calculated as 28. If the offenses had been grouped together, Glover's total offense level would have been 26. Op. at 2.

Glover appealed his sentence, but did not appeal the separate grouping of the money laundering and kickback offenses. *United States v. Glover*, 101 F.3d 1183 (7th Cir. 1996). On October 17, 1996, after Glover's appeal before this Court had been argued, this Court held in *United States v. Wilson*, 98 F.3d 281, 284 (7th Cir. 1996), that money laundering and mail fraud counts should be grouped together pursuant to U.S.S.G. § 3D1.2(d).

On November 26, 1997, Glover filed a *pro se* petition in the district court, pursuant to 28 U.S.C. § 2255, claiming that his attorneys were ineffective both at his sentencing and on appeal. R. 1. Glover claimed, among other things, that his counsel had neither made any argument opposing the United States' motion to group the money laundering and kickback offenses separately nor appealed from the district court's grouping decision. R. 1 at 23-26. The United States filed a response opposing Glover's § 2255 Petition (R. 5), and Glover filed a reply to the United States' response in which he further developed his arguments. R. 6.

The district court denied Glover's petition on September 3, 1998. In a written opinion, the district court observed that in order for a defendant to prove his attorney's ineffectiveness, "it must be shown both that counsel's performance was deficient and that the deficient performance prejudiced the defendant." Op. at 4-5 (citing *Melvin v. United States*, 78 F.3d 327, 329 (7th Cir.), *cert. denied* , 117 S. Ct. 384 (1996)).

With respect to Glover's claim that his attorneys' ineffectiveness had prejudiced him, the district court concluded that Glover had not suffered prejudice. The district court observed that

> [a]lt the time of sentencing, it was determined that Glover's total offense level was 28 and his criminal history was I for a guidelines range of 78 to 97 months. He was sentenced to 84 months, incarceration. Had the money laundering been grouped with the conspiracy and kickback offenses, the total offense level would have been 26 and the guideline range would have been 63 to 78 months. Glover's sentence would have had to have been reduced by at least 6 months and possibly up to 21 months, though it is unlikely that he would have been sentenced to the low end of the 63-78 month range since he was not sentenced on the low end of the 78-97 month range.

Op. at 2 (footnotes omitted). The district court also noted that "[t]he tax offenses could have been a basis for not sentencing on the low end. *See* U. S. S. G. § 3D1. 4 (c)." Op. at 3 n.2. The district court held that the two-level increase was not a "significant change that would satisfy the prejudice requirement." Op. at 5. Because Glover had not satisfied the prejudice requirement, the district court did not consider the issue of his counsels' deficient performance. Op. at 4.

SUMMARY OF ARGUMENT

To demonstrate ineffective assistance of counsel, Glover must show both that his counsels' performance was deficient and that this deficiency prejudiced him. In the sentencing context, prejudice may be established by showing that a defendant suffered a "significant" increase in his sentence as result of his counsel's performance. Glover's counsels' alleged deficiency resulted in Glover's Sentencing Guidelines total offense level being determined to be 28 rather than 26. This two-level change is not sufficient to establish that Glover suffered an increase sufficient to establish "significant" prejudice. Thus, the district court correctly denied Glover's Motion to Correct Sentence.

ARGUMENT

I. Standard of Review

> Upon appeal from a district court's denial of a § 2255 motion, [the Court of Appeals] review[s] questions of law *de novo* and factual questions for clear error. *Bond v. United States*, 77 F.3d 1009, 1012 (7th Cir.), ... A defendant's ineffective assistance of counsel claim is a mixed question of law and fact and is also reviewed *de novo*. *United States v. Placente*, 81 F.3d 555, 558 (5th Cir. 1996).

Stoia v. United States, 109 F.3d 392, 395 (7th Cir. 1997).

II. The Potential Effect on Glover's Sentence of His Attorneys' Claimed Deficient Performance Does Not Satisfy the Prejudice Component of an Ineffective Assistance of Counsel Claim.

Glover argues that the district court erred in denying his petition filed pursuant to 28 U.S.C. § 2255, in which he alleged that he received ineffective assistance of counsel at the sentencing phase of his case. Glover makes three basic arguments in support of his position: First, that this Court's opinions in *Durrive v. United States*, 4 F.3d 548 (7th Cir. 1993), and *Martin v. United States*, 109 F.3d 1177 (7th Cir. 1996) (*en banc*) , *cert. denied*, 118 S. Ct. 335 (1997), were wrongly decided; second, that Glover's case falls within an "exception" to the *Durrive* and *Martin* holdings; and third, that even under the *Durrive* and *Martin* holdings, Glover has established prejudice. Each of Glover's arguments must fail.

A. *Durrive* and *Martin* Were Not Wrongly Decided.

Glover first argues that *Durrive* and *Martin* were wrongly decided. Br. at 8-13. Glover raises a myriad of subarguments in support of this proposition. Of these, Glover's most salient arguments are that the "'significant' prejudice rule" and "rule of proportionality" in *Durrive* and *Martin* are in conflict with the Sentencing Guidelines, Br. at 9-11, and that the "*Durrive* and *Martin* definition of 'significant' prejudice has led to concerns within the Circuit," Br. at 10.[2] Each of Glover's arguments must fail,

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[2] Glover also argues that no other jurisdiction supports the *Durrive* and *Martin* definition of prejudice and that the *Durrive* and *Martin* holdings are mere evidence of this Court's "irritation with Section 2255 cases." Br. at 12-13. These arguments are without merit

1. Background for this Court's Holding in *Durrive* and *Martin*

Title 28, United States Code, Section 2255 permits a court to grant relief in only three instances, those in which: 1) the sentence was imposed in violation of the Constitution or the laws of the United States; 2) the court was without jurisdiction to impose such sentence; or 3) the sentence was in excess of the maximum allowed by law, or is otherwise subject to collateral attack. 28 U.S.C. § 2255. This Court has repeatedly admonished the lower courts to respect the limitations on their powers under § 2255. *See United States v. Springs*, 988 F.2d 746, 748-49 (7thCir. 1993). In *Scott v. United States*, 997 F.2d 340 (7th Cir. 1993), this Court gave a detailed explanation of the limitations on that power and emphasized that where the defendant does not meet the requirements of § 2255, not only should the district court not address the merits of the defendant's arguments, the district court lacks the power to address the merits of the defendant's arguments. *Id.* at 341.

In *Scott*, the defendant was convicted and sentenced to 57 months imprisonment. No appeal was taken. One year later, the defendant filed a § 2255 petition contending that the district court had misapplied the Sentencing Guidelines in determining his sentence. Id. The district court judge considered the merits of the defendant's argument, and conceded that he should not have increased Scott's criminal history under U.S.S.G. § 5K2.6. *Id.* The district court nonetheless declined to reduce Scott's sentence, reasoning that the same sentence was independently justified as an upward departure from the Guidelines' range. *Id.*

This Court affirmed the dismissal of the § 2255 petition, but first stated that the district court should not have addressed Scott's arguments on the merits because the judgment had become final and was not appealed. *Id.* " The district judge addressed Scott's arguments on the merits, just

as if his petition were a timely post-judgment motion for reconsideration. It is not." *Id.* at 340. This Court noted that the Sentencing Guidelines had repealed "old" Rule 35 of the Federal Rules of Criminal Procedure, effectively removing the district court's power to modify a sentence for persons sentenced under the guidelines.

> Once seven days have run, sentences said to be illegal or improvident or just plain too long are beyond the power of the district court to modify . . . . [T]he system established by the Sentencing Reform Act will be upset if litigants and judges just substitute § 2255 for the old Rule 35 and go on as if nothing has changed. Judges must respect the limitations on their power under § 2255.

Id. at 341; accord, *United States v. Mosely*, 967 F.2d 242, 243 (7th Cir. 1992) (even "blunders that would be 'Plain error' on direct appeal do not authorize collateral relief").

In *Scott*, this Court held that a claim that the district court misapplied the Sentencing Guidelines does not invoke any of the stated grounds in 28 U.S.C. § 2255 because it does not challenge the jurisdiction of the court, or assert that the judge exceeded the statutory maximum . *Scott*, 997 F.2d at 341. Furthermore, this Court held that the Sentencing Guidelines are not "laws" within the meaning of § 2255, but instead are "regulations" whose force is analogous to that of the Rules of Federal Criminal Procedure. *Id.* Accordingly, absent a "com-
plete miscarriage of justice," assertions of a misapplication of the Sentencing Guidelines provide no basis for review under § 2255. "[W]e conclude that arguments of the sort Scott proffers must be advanced on direct appeal or not at all." *Id.* at 343.

Subsequently, this Court considered whether a § 2255 claim of ineffective assistance of counsel could be satisfied by a defendant's attorney's deficient performance with

respect to the determination of the defendant's sentencing guidelines. The standards that govern a court's consideration of a claim of ineffective assistance of counsel are set forth in *Strickland v. Washington* , 466 U.S. 668 (1984). In *Strickland,* the Supreme Court established a two-part test governing claimed violations of a defendant's Sixth Amendment right to effective counsel. Under *Strickland* , a defendant has the burden of proving both that (1) "counsel's performance was deficient," *id.* at 687, and (2) "that the deficient performance prejudiced the defense," *id.*, that is, that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

2. This Court's Holding in *Durrive* and *Martin*

In *Durrive*, this Court clarified what constitutes 'prejudice" for purposes of *Strickland*, in relation to alleged errors in sentencing. *Id.* at 549. In *Durrive*, the defendant was convicted and sentenced to 120 months imprisonment for conspiracy to distribute cocaine. *Id.* In a petition filed pursuant to 28 U.S.C. § 2255, the defendant asserted that the district court had not complied with Fed.R.Crim.P. 32. *Id.* The defendant recognized that noncompliance with a rule of procedure (*i.e.*, Rule 32) could not be raised through collateral attack. *Id.* (citing *United States v. Timmreck*, 441 U.S. 780 (1979)).

Accordingly, the defendant in *Durrive* attempted to recast the alleged violation of Rule 32 as an ineffective assistance of counsel claim. The defendant asserted that if his counsel had objected to the noncompliance with Rule 32, his sentencing range would have been 87 to 108 months, resulting in at least a 12-month reduction from the 120-month sentence the defendant received. *Id.* at 550. This Court concluded that, in relation to sentencing, only a "grave error" by counsel, that is, an error that produces a "significant" effect on the sentence,

could be deemed "prejudice" within the meaning of *Lockhart v. Fretwell*, 506 U.S. 364 (1993). *Id.*

> In order to avoid turning Strickland into an automatic rule of reversal in the non-capital context, . . . in deciding such an ineffectiveness claim, a court must determine whether there is a reasonable probability that but for the trial counsel's errors the defendant's non-capital sentence would have been significantly less harsh.

Id. at 551 (quoting, *Spriggs v. Collins*, 993 F.2d 85, 88-89 (5th Cir. 1993)). This Court then held that the defendant could not establish "prejudice" under *Strickland* because, even if his counsel had been deficient, the 12 to 22 month potential difference in his sentence was not a "significant" difference. *Id.*; *Spriggs*, 993 F.2d at 90.

The *Durrive* court was guided by the reasoning of the Fifth Circuit in the *Spriggs* case in defining what constitutes a "significant" effect on sentencing. In *Spriggs*, the defendant received a 35-year sentence (out of a possible 99-year sentence) in state court for murder. Spriggs, 993 F.2d at 87. The defendant filed a petition pursuant to 28 U.S.C. § 2254 alleging that his counsel had "failed to object to erroneous information in [the] pre-sentence investigation report used by the trial court during sentencing." *Id.* Since *Lockhart* requires in a capital case that "prejudice" be appreciable before relief is warranted, the Fifth Circuit found that in non-capital cases, counsel's omissions must cause a "significant" increase in the defendant's sentence, to render it "unreliable or . . . fundamentally unfair," and therefore establish "prejudice" within the meaning of *Lockhart*. *Id.* The Fifth Circuit found that counsel's actions were deficient, but held that the defendant had suffered no "prejudice" sufficient to satisfy the *Strickland* standard. *Id.* at 90.

The holding in *Durrive* was reaffirmed in *Martin* in a rehearing *en banc*. In *Martin* , the defendant claimed that his attorney's ineffective assistance had cost him "about a single criminal-history level (equivalent to two offense levels)." *Id.* at 1178. The *Martin* court rejected his claim, finding that the defendant had failed to demonstrate the *Strickland* "prejudice" prong. *Id.*"

In *Martin*, this Court first noted that, as held in *Scott*, *supra*, in the absence of a "fundamental miscarriage of justice," an "argument based on the Sentencing Guidelines must be raised on direct appeal or not at all." *Id.* The defendant in *Martin* tried to get around this by claiming that the Sentencing Guidelines error in his case was based upon his attorney's ineffective assistance of counsel. In particular, Martin claimed that his appellate attorney had failed to appeal from the district court's error in assigning him a criminal history category of IV instead of his deserved III. *Id.* at 1179. But this Court rejected this maneuver, citing the holding in *Durrive* that "to satisfy the 'prejudice' component of *Strickland*, a person who complains about his sentence must demonstrate that counsel's deficient performance led to a 'significant' increase in the sentence." *Id.*

> Although we recognized in *Durrive* that any extra time in prison is significant from the defendant's perspective, we adopted a rule of proportionality: the sort of increase produced by a few levels' difference in sentencing calculations cannot be raised indirectly on collateral attack by complaining about counsel's work. A few levels is exactly what Martin wants us to examine. Actually, his complaint is about a single criminal-history level (equivalent to two offense levels). Such an argument is barred by *Scott* when presented directly, and by *Durrive* when presented as an attack on counsel's performance.

Id.

3. Response to Glover's Arguments

First, Glover argues that this Court's "'significant' prejudice rule" and "Rule of Proportionality" in *Durrive* and *Martin* are in conflict with the Sentencing Guidelines. Br. at 9-11. With respect to this Court's "significant" prejudice test, Glover argues that because the Sentencing Guidelines place specific limits on a sentencing court's discretion, *any* offense level change in a defendant's sentence is "significant." Br. at 10.

Glover's argument must fail because it confuses what is a "significant" change for Sentencing Guidelines purposes with what is a "significant" change for Constitutional purposes. Glover's observation that for guideline calculation purposes, any offense level change may be "significant," is correct. A sentencing court's discretion is strictly limited by the Sentencing Guidelines, and thus, a sentencing court's decision as to offense level designation is significant in that it is subject to direct review.

But the constitutional test of "significance" is different. Glover's § 2255 motion is based upon the claim that his sentence was imposed in violation of the Constitution, in particular, his Sixth Amendment right to counsel. "The Constitution permits courts substantial leeway in the procedures used to arrive at a sentence." *Durrive*, 4 F.3d at 549-50 (citing *United States v. Dunningan*, 507 U.S. 87, 94-98 (1993)); *United States v. Grayson*, 438 U.S. 41 (1978); *Williams v. Oklahoma*, 358 U.S. 576 (1959); *Williams v. New York*, 337 U.S. 241 (1949).

Under *Lockhart*, the Constitutional test is whether counsel's deficiencies "render[ed] the result . . . unreliable or the proceeding fundamentally unfair." *Id.* at 372. For this reason, as recognized in *Spriggs*, 993 F.2d at 88-89, and *Durrive*, 4 F.3d at 551, the Constitutional test of "'significance' is a relative term." Therefore, it would be

inappropriate to consider *any* change in a defendant's sentencing guidelines to be a "significant" change for Constitutional purposes, as Glover proposes.

Glover's attack on the "Rule of Proportionality" he finds in *Durrive* and *Martin* is likewise flawed. Glover claims that *Durrive* and *Martin* countenance changes in a defendant's offense level of up to six levels or "potentially a 50 per cent incorrect increase in a defendant's sentence!" Br. at 11. But Glover seriously misreads *Durrive* and *Martin*. In *Durrive*, this Court found an adjustment of two or three levels not to be "significant," *Durrive*, 4 F.3d at 551, and in *Martin*, this Court found an adjustment of one criminal history category, the equivalent of two offense levels, not to be "significant," *Martin*, 109 F.3d at 1178-79. Neither portends the accepted level of error Glover suggests.

Second, Glover argues that the holdings of *Durrive* and *Martin* have "led to concerns within the Circuit." Br. at 11. But Glover is unable to document any such widespread concern. Glover's only support for this proposition comes from the dissent in *Martin* and the district court's observations in this case. *Id.* Contrary to Glover's allegations, in neither this case nor most others have district courts had problems in applying the *Durrive* and *Martin* test. Op. at 6-7; *see, e.g., Unger v. United States*, 8 F. Supp. 2d 1151, 1155 (E.D.Wis. 1998), *United States v. Lloyd*, 983 F. Supp. 738, 746-447 (N.D. Ill. 1997), *Gonzales v. United States*, 967 F. Supp. 326, 332-33 (N.D. Ill. 1997), *Davis v. United States*, 1998 WL 142369 *3 (N.D. Ill.), *United States v. Allen*, 1997 WL 445823 * 1 (N.D. Ill); *but see, e.g., United States v. Tai*, 972 F. Supp. 434, 438 n.4 (N.D. Ill. 1997).

B. Glover Does Not Fall Within Any Exception to *Durrive* and *Martin*.

Glover next argues that his case falls within an "exception" to the *Durrive* and *Martin* holdings. In making this argument,

Glover relies upon dicta in *Spriggs*. In *Spriggs*, the court noted

> one foreseeable exception to this requirement [showing of "significant" prejudice] would be when a deficiency by counsel resulted in a specific, demonstrable enhancement in sentencing—such as an automatic increase for a "career" offender or an enhancement for use of a handgun during a felony—which would have not occurred but for counsel's error.

Id. at 88 n.4. Glover's argument must fail because this Court has never, for good reason, adopted this suggested "exception."

In neither *Durrive* nor *Martin*, nor any other case addressing this issue, has this Court adopted the "foreseeable exception," suggested in *Spriggs*. Indeed, in application, this Court has rejected the *Spriggs* exception. In *Martin*, this Court specifically applied the "significant" prejudice test in a case that involved a specific guidelines enhancement in sentencing, *i.e.*, an increase in Martin's criminal history category from III to IV, which defendant argued was a result of counsel's error, *i.e.*, appellate counsel's failure to appeal from the district court's designation. *Martin*, 109 F.3d at 1179. In *Durrive*, this Court applied the "significant" prejudice test where the defendant alleged that the court's specific failure to find that the quantity of cocaine involved was less than two kilograms increased his offense level from 26 to 28. *Durrive*, 4 F.3d at 551. Thus, where presented with factual situations in which Glover suggests the *Spriggs* "exception" should apply, this Court has found no "exception." Instead, this Court's only favorable mention of the Spriggs "exception" is in the Martin dissent. *Martin*, 109 F.3d at 1182.

It is for good reason that this Court has not adopted the "exception" suggested by *Spriggs*. In practice, this

"exception" would swallow the rule. There is very little discretion for a sentencing court within the sentencing guidelines. Most all complaints regarding sentencing guidelines calculations involve specific determinations resulting in "demonstrable enhancements." For this reason, under the suggested *Spriggs* "exception, " if a defendant could base his claim of prejudice on the application of any specific sentencing guideline, he would not need to meet the "significant" prejudice test. Very few sentencing guidelines disputes would not fall within this "exception."

C. Glover Has Not Established "Significant" Prejudice as Required by *Durrive* and *Martin*.

Finally, Glover argues that he has suffered "significant" prejudice as required by *Durrive* and *Martin*. Glover claims that the "17.9% increase in his sentence [from 69 months to 84 months] must be considered 'significant' in the context of his 84-month sentence." Br. at 14. Glover's claim must fail because the increase in his sentence parallels closely the increase found not to be "significant" in *Durrive*.

The district court calculated Glover's total offense level as 28, Criminal History Category I (78 to 97 months) and sentenced Glover to 84 months incarceration. Glover claims that his total offense level should have been 26, Criminal History Category I (63 to 78 months). If so, Glover's sentence would have been reduced by between 6 and 21 months. If, as the district court suggests, Glover's offense level had been 26, and he had been sentenced to "6 [months] above the low end as was his original sentence," Op. at 7 n.8, Glover would have received a sentence of 69 months incarceration, or a reduction of 15 months. This potential change in Glover's sentence is similar to the reduction approved in *Durrive*.

In *Durrive*, the district court found the defendant's guideline range to be from 108 to 135 months, and the

defendant was sentenced to 120 months incarceration. Under the "correct" application of the guidelines, the defendant's guideline range would have been from 87 to 108 months incarceration. *Durrive*, 4 F.3d at 551. This would have resulted in a potential adjustment of between 10% (if defendant were resentenced to 108 months) and 18.3% (if defendant were sentenced to 98 months, as approved in *Durrive*, *id.*). The *Durrive* Court found that a sentence of 98 months (22 months less) on resentencing would not have been a "significant" difference. *Id.* A sentence of 98 months incarceration would have resulted in an adjustment of 18.3%.

In this case, the district court found Glover's guideline range to be from 78 to 97 months, and sentenced him to 84 months incarceration. Under the "correct" application of the guidelines, Glover's guideline range would have been from 63 to 78 months incarceration. This would have resulted in a potential adjustment of between *7.1%* (if Glover were resentenced to 78 months) and *25%* (if Glover were resentenced to 63 months) (compared with between *10%* and *18.3%* approved in Durrive). If, as the district court suggested, Glover were resentenced to 69 months (like his original sentence, 6 months above the low end), his resentence (*15* months less, compared with the 22 months less approved in *Durrive*) would have resulted in an adjustment of *17.9%* (compared with the 18.3% adjustment approved in *Durrive*). In all respects, the increase in his sentence of which Glover complains is similar to the increase found in *Durrive* not to constitute "significant" prejudice. Accordingly, as in *Durrive*, Glover did not suffer sufficient prejudice from his attorneys' alleged deficiency to warrant relief under § 2255.

CONCLUSION

For the foregoing reasons, the United States respectfully requests that the district court's order denying Glover's § 2255 petition be affirmed.

Respectfully submitted,

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In The

Supreme Court of the United States

PAUL L. GLOVER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE FAMILIES AGAINST MANDATORY MINIMUMS FOUNDATION AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether a defendant must demonstrate a "significant" increase in his sentence to satisfy the prejudice prong of the test established by *Strickland v. Washington,* 466 U.S. 668 (1984), when he alleges his counsel was ineffective at sentencing and on appeal?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
INTERESTS OF AMICI	1
SUMMARY OF THE ARGUMENT	3
ARGUMENT	
I. THE SEVENTH CIRCUIT "SIGNIFICANT PREJUDICE" TEST CONTRAVENES THE COURT'S INEFFECTIVE ASSISTANCE OF COUNSEL JURISPRUDENCE	4
II. THE SEVENTH CIRCUIT "SIGNIFICANT PREJUDICE" TEST UNDERMINES CORE PRINCIPLES OF THE FEDERAL WRIT OF HABEAS CORPUS	11
III. THE SEVENTH CIRCUIT "SIGNIFICANT PREJUDICE" TEST EXACERBATES A SIGNIFICANT PROBLEM IN THE REPRESENTATION OF FEDERAL CRIMINAL DEFENDANTS	18
CONCLUSION	23

TABLE OF AUTHORITIES

	Page
CASES	
Apprendi v. New Jersey, 530 U.S. —, 120 S. Ct. 2348 (2000)	18
Coleman v. Thompson, 501 U.S. 722 (1991)	17
Cuyler v. Sullivan, 446 U.S. 335 (1980)	6
Durrive v. United States, 4 F.3d 548 (7th Cir. 1993)	*passim*
Edwards v. Carpenter, 529 U.S. —, 120 S. Ct. 1587 (2000)	16
Felkner v. Turpin, 518 U.S. 651 (1996)	16
Geders v. United States, 425 U.S. 80 (1976)	6
Holloway v. Arkansas, 435 U.S. 475 (1978)	6
Jackson v. Leonardo, 162 F.3d 81 (2d Cir. 1998)	13
Kimmelman v. Morrison, 477 U.S. 365 (1986)	9
Lockhart v. Fretwell, 506 U.S. 364 (1993)	*passim*
Lonchar v. Thomas, 517 U.S. 314 (1996)	16
Martin v. United States, 109 F.3d 1177 (7th Cir. 1996)	21, 22
Mistretta v. United States, 488 U.S. 361 (1989)	14
Nix v. Whiteside, 475 U.S. 157 (1986)	6, 7, 8, 10, 11
Preiser v. Rodriguez, 411 U.S. 475 (1973)	13
Roe v. Flores-Ortega, 528 U.S. —, 120 S. Ct. 1029 (2000)	5, 6
Schlup v. Delo, 513 U.S. 298 (1995)	13
Smith v. Robbins, 528 U.S. —, 120 S. Ct. 746 (2000)	5, 10

TABLE OF AUTHORITIES – Continued

Page

Stack v. Boyle, 342 U.S. 1 (1951) 14

Strickland v. Washington, 466 U.S. 668 (1984)..... *passim*

Thornburgh v. Abbott, 490 U.S. 401 (1989).....17, 18

United States v. Cronic, 466 U.S. 648 (1984) 5

United States v. Day, 969 F.2d 39 (3d Cir. 1992) 20

United States v. Granados, 168 F.3d 343 (8th Cir. 1999)..... 13

United States v. Mannino, 212 F.3d 835 (3d Cir. 2000).....10, 13

United States v. Palomba, 31 F.3d 1456 (9th Cir. 1994) 13

United States v. Phillips, 210 F.3d 345 (5th Cir. 2000) 16

United States v. Severson, 3 F.3d 1005 (7th Cir. 1993) 15

United States v. Soto, 132 F.3d 56 (D.C. Cir. 1997) 19

Williams v. Taylor, 529 U.S. —, 120 S. Ct. 1495 (2000)..... *passim*

CONSTITUTION, STATUTES; AND RULES

U.S. Const., amend. V 13

U.S. Const., amend. VI ..... *passim*

18 U.S.C. § 3551(a) 12

18 U.S.C. § 3553(b) 12

18 U.S.C. § 3742.....14, 15

28 U.S.C. § 2255..... 11, 12, 14, 16

TABLE OF AUTHORITIES – Continued

Page

Antiterrorism and Effective Death Penalty Act of 1996 16

Proposed Sentencing Guidelines for United States Courts, 52 Fed. Reg. 3920 (1987)..... 15

Sentencing Reform Act of 1984 19

Supreme Court Rule 37..... 1

United States Sentencing Guidelines, 18 U.S.C. Appendix ..... *passim*

MISCELLANEOUS

Jack Henry Abbott, IN THE BELLY OF THE BEAST (1981)..... 17

Mary Pat Flaherty & Joan Biskupic, *Despite Overhaul, Federal Sentencing Still Misfires*, Wash. Post, Oct. 6, 1996, at A21 19

Mary Pat Flaherty, *Innocent Errors Add Years to Terms of Guilty Parties*, Wash. Post, Oct. 6, 1996, at A21 21

Kate Stith & Jose Cabranes, FEAR OF JUDGING (1998).....15, 21

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE FAMILIES AGAINST MANDATORY MINIMUMS FOUNDATION AS AMICI CURIAE IN SUPPORT OF PETITIONER

The **National Association of Criminal Defense Lawyers** (NACDL) and the **Families Against Mandatory Minimums Foundation** (FAMM) filed this amicus brief pursuant to Rule 37.2(a) of the Rules of the Supreme Court of the United States in support of the petitioner, Paul L. Glover. Both petitioner and respondent have granted amici consent to file this brief, and amici have filed letters of consent with the Clerk of the Court.[1]

INTEREST OF AMICI

NACDL, a nonprofit corporation founded more than 40 years ago, is the only national bar association working in the interest of public and private criminal defense attorneys and their clients. In addition to its 10,000 member attorneys, including citizens of every state, NACDL has over 80 state and local affiliates with a combined membership of some 25,000. The American Bar Association recognizes NACDL as an affiliate and accords it representation in its House of Delegates.

NACDL was founded to promote study and research in the field of criminal law and to disseminate and

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[1] In accordance with Supreme Court Rule 37.6, NACDL and FAMM represent that no counsel for any party to this case authored this brief in whole or in part, and no person or entity, other than NACDL and FAMM, made any monetary contribution to its preparation and submission.

advance knowledge of the law in the area of criminal practice. NACDL also seeks to encourage integrity, independence, and expertise of defense lawyers in criminal cases. In particular, NACDL has long recognized the significant impact the Sentencing Guidelines have had on federal criminal practice and has sought through its seminars and continuing legal education programs to educate and train attorneys in this area. NACDL is aware, however, that some criminal defense attorneys have been overwhelmed by the complexity and ever changing body of appellate decisions and Sentencing Commission commentary and amendments that interpret the Guidelines. NACDL believes that the Sixth Amendment must be held to guarantee criminal defendants the right to an attorney who is both competent and current on Guidelines issues.

FAMM is a nonprofit, nonpartisan organization that conducts research, promotes advocacy and educates the public regarding the excessive cost of mandatory minimum sentencing. This cost is not limited to public expenditures but includes the perpetuation of unwarranted sentencing disparities, disproportionate sentences, and the transfer of the sentencing function from the judiciary to the prosecution.

Founded in 1991, FAMM has 30 chapters and 18,000 members nationwide. FAMM conducts sentencing workshops for its members, publishes a newsletter, serves as a sentencing clearinghouse for the media, and researches sentencing cases for pro bono litigation. FAMM does not argue that crime should go unpunished, but that the punishment should fit the crime. As an alternative to

mandatory sentences, FAMM supports sentencing guidelines systems that are more sensitive to differences in culpability.

Therefore, FAMM has a special interest in ensuring that the Sentencing Guidelines function as they were designed – to reduce disparities – rather than create additional injustices through inconsistent application. FAMM's Litigation Project, which was launched in 1995, provides input to the U.S. Sentencing Commission on Guidelines amendments and reform, submits amicus curiae briefs in state and federal court, assists criminal defense counsel appearing before this Court, and screens cases for possible referral to pro bono counsel. Over the past five years, the Litigation Project's staff has reviewed hundreds of letters and documents from prisoners serving mandatory minimum and guideline sentences. FAMM's legal staff has found numerous cases in which guideline errors have resulted in higher sentences. While not every case necessarily involved ineffective assistance of counsel, FAMM believes that attorney error in Guideline sentencing is a recurring problem.

SUMMARY OF THE ARGUMENT

The Seventh Circuit requires a federal district judge to refuse even to consider a federal prisoner's first post-conviction claim that his counsel's ineffective assistance caused him to receive a longer sentence, unless the length of additional incarceration is in some undefined way "significant." This requirement misunderstands this Court's ineffective assistance of counsel decisions and its

cost/benefit analysis contravenes the principles of equity and due process that underlie the Court's ineffective assistance of counsel and habeas corpus jurisprudence. Amici also contend that the Seventh Circuit's approach turns a blind eye to real problems of attorney competence in the Sentencing Guidelines era. For these reasons, the "significant prejudice" test must be overturned and this case remanded for reconsideration and ultimately for resentencing.

ARGUMENT

I. THE SEVENTH CIRCUIT "SIGNIFICANT PREJUDICE" TEST CONTRAVENES THE COURT'S INEFFECTIVE ASSISTANCE OF COUNSEL JURISPRUDENCE.

Just last Term in *Williams v. Taylor*, 529 U.S. —, 120 S. Ct. 1495, 1511 (2000), the Court concluded that the Virginia Supreme Court "erred in holding that . . . *Lockhart v. Fretwell*, 506 U.S. 364 (1993), [had] modified or in some way supplanted the rule set down in *Strickland*." 120 S. Ct. at 1511. The Seventh Circuit committed the same essential error in *Durrive v. United States*, 4 F.3d 548 (7th Cir. 1993), where it created the "significant prejudice" test of which petitioner complains.

This case can best be understood in the context of the Court's ineffective assistance of counsel jurisprudence. The Court has emphasized that "the Sixth Amendment right to counsel exists 'in order to protect the fundamental right to a fair trial.' " *Lockhart v. Fretwell*, 506 U.S. 364, 368 (1993) (quoting *Strickland v. Washington*, 466 U.S. 668, 684 (1984)). Therefore, " 'the right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial. Absent some effect of challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated.' " *Lockhart*, 506 U.S. at 369 (quoting *United States v. Cronic*, 466 U.S. 648, 658 (1984)).

The established means by which a defendant proves that the fundamental fairness of the proceeding was undermined by his counsel's error is the familiar two-part test set forth in *Strickland*. 466 U.S. at 690. This test applies to all phases of attorney performance; from pretrial investigation through direct appeal. *Roe v. Flores-Ortega*, 528 U.S. —, 120 S. Ct. 1029, 1034 (2000) (*Strickland* governs ineffective assistance on direct appeal); *Smith v. Robbins*, 528 U.S. —, 120 S. Ct. 746 (2000) (same). *Strickland* requires that the defendant show first, that his counsel's performance was deficient and second, that the deficiency prejudiced the defendant. In *Strickland* and its progeny, prejudice has consistently been defined as whether there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694; *Roe v. Flores-Ortega*, 120 S. Ct. at 1037; *Smith v. Robbins*, 120 S. Ct. at 764.

As recently as last Term, the Court stated that the original *Strickland* test is sufficient to resolve virtually all ineffective assistance of counsel cases. *Williams v. Taylor*, 120 S. Ct. at 1511. Nevertheless, the Court has also consistently held that several situations are so egregious that

prejudice should be presumed because "during the judicial proceeding [the defendant] was – either actually or constructively – denied the assistance of counsel altogether. *Roe v. Flores-Ortega*, 120 S. Ct. at 1038. *See Geders v. United States*, 425 U.S. 80 (1976) (government interference with right to counsel); *Cuyler v. Sullivan*, 446 U.S. 335 (1980) (actual conflict adversely affecting performance); *Holloway v. Arkansas*, 435 U.S. 475 (1978) (same). At the other end of the spectrum, the Court has twice recognized unique circumstances under which "it would be unjust to characterize the likelihood of a different outcome as legitimate 'prejudice.' " *Williams v. Taylor*, 120 S. Ct. at 1512. In these two isolated cases, although the defendant could arguably show that had his counsel acted differently, there would have been a different outcome at the time, upon further examination, the Court concluded that the defendant had not actually been deprived of a "substantive or procedural right to which the law entitles him." *Id.* at 1513.

In the first of these exceptional cases, *Nix v. Whiteside*, 475 U.S. 157 (1986), although the defendant's perjured testimony might have induced the jury to acquit him, the Court concluded that it was not fundamentally unfair to conclude that he was not prejudiced by counsel's interference with his intended perjury. The Court held that because perjury and assisting perjury are forbidden by the criminal law and attorney ethical codes, the defendant had no right of any kind to commit perjury and therefore, he could not have been prejudiced by his attorney's refusal to assist him do so. *Id.* at 994-97. In essence, *Nix* simply implements *Strickland's* admonition that a

defendant has no "entitlement to the luck of a lawless decisionmaker." *Id.* at 695.

Also considered to be in this special category is *Lockhart v. Fretwell*, 506 U.S. 364 (1993). Although counsel failed to bring a relevant and helpful precedent to the court's attention at sentencing, that opinion was later overruled. Thus, the Court held the defendant would be receiving a windfall if given the benefit of the now overruled and thus presumptively erroneous case. The Court stated in *Lockhart* that an analysis that focused "solely on mere outcome determination, without attention to whether the result was fundamentally unfair or unreliable, is defective." 506 U.S. at 842. This sentence, taken out of context, is the fount of the erroneous doctrine under review here. In establishing its "significant prejudice" test, the Seventh Circuit failed to recognize that only because of the unique facts of *Nix* and *Lockhart* did the Court conclude that what on the surface looked like prejudice, did not actually amount to an unjust result because the defendant was not legally entitled to do the act or rely on the legal point which would have changed the outcome. Absent such an unusual scenario, *Strickland's* "reasonable probability of a different outcome" is the only inquiry required to determine if a petitioner was prejudiced by his counsel's errors.

Last Term in *Williams*, the Court explicitly emphasized that *Nix* and *Lockhart's* prejudice analysis is irrelevant to the ordinary ineffective assistance of counsel case. Quoting Justice O'Connor's concurrence in *Lockhart*, the Court emphasized that *Lockhart's* focus on whether the prejudice alleged, *i.e.*, the likely difference in the outcome, truly was the result of some fundamental unfairness:

> will in the vast majority of cases, have no effect on the prejudice inquiry under *Strickland v. Washington*. The determinative question – whether there is 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different' – remains unchanged.

Id. (citations omitted). Moreover, *Williams* makes absolutely clear that the unusual feature of both *Nix* and *Lockhart* was an attempt by the defendant to "demonstrate prejudice based on considerations that, as a matter of law, ought not to inform the inquiry." 120 S. Ct. at 1513 n.18. Moreover, other than a defendant's desire to commit perjury in his own defense, as in *Nix*, or a reliance on overruled precedent, as in *Lockhart*, the Court has never suggested any other situation that would justify a "departure from a straightforward application of *Strickland*" and its definition of prejudice. *Id.* at 1513. This is because, as *Williams* went on to say, "fundamental fairness," the overarching concern in *Strickland*, is obviously undermined whenever "the ineffectiveness of counsel does deprive the defendant of a substantive or procedural right to which the law entitles him." 120 S. Ct. at 1513.

In *Williams*, the Virginia Supreme Court interpreted *Lockhart* to require some kind of inquiry into fundamental fairness even when a lawyer "was ineffective and that his ineffectiveness probably affected the outcome of the proceeding." *Id.* at 1513. Therefore, that state court refused to grant Williams' petition even though his counsel failed to present readily available evidence that established a reasonable probability that the jury would not have voted for the death penalty. In reversing, this Court held that

barring some effort by the defendant to rely on a factor that as a matter of law may not be considered, the *Strickland* formulation – a reasonable probability of a difference in outcome – is sufficient to meet the prejudice prong of this Court's ineffective assistance of counsel test. 120 S. Ct. at 1515.

With this background, the Seventh Circuit's error in this case is clear. Like the Virginia Supreme Court's erroneous decision in *Williams*, *Durrive* read *Lockhart* to "reject the equation between causation and prejudice" in all ineffective assistance of counsel cases. *Durrive*, 4 F.3d at 550. Thus, the Seventh Circuit asserted in *Durrive* that in addition to an unprofessional error that resulted in prejudice, the prisoner must also show that these errors in some way "so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect." 4 F.3d at 550 (quoting *Kimmelman v. Morrison*, 477 U.S. 365, 374 (1986)). Thus, *Durrive* added a second step to the prejudice prong in every ineffectiveness assistance of counsel petition; first, the defendant must show that there is a reasonable probability that the result would have been different but for counsel's unprofessional error, and second, some vague "fundamental fairness" inquiry is conducted. To the contrary, *Williams* makes clear that in virtually all cases, the *Strickland* definition of prejudice is sufficient exactly because an unprofessional error that was reasonably likely to have affected the outcome is an error "that undermine[s] confidence in the fundamental fairness" of the lower court proceeding. 120 S. Ct. at 1503. Therefore, the Seventh Circuit's addition of another layer of inquiry

to the prejudice prong is not only unsupported by precedent, it is also redundant and illogical.

In this case, there is no question that under *Williams*, only the *Strickland* test was required to evaluate petitioner's claim for relief. Here, counsel failed to apprise the court of appeals of a controlling decision announced while his appeal was pending. If the appellate court had been aware of this precedent, which continues to be in effect to this date (compare *Lockhart)*, his appeal would have been granted, his sentence vacated, and the case would have been remanded for re-sentencing. Under *Smith v. Robbins*, 120 S. Ct. at 764, such a showing, without more, constitutes prejudice in an ineffective assistance of counsel on appeal case. *Id.* (failure to file merits brief is judged by same *Strickland* standard that applies to all ineffective assistance of counsel on appeal cases – that a defendant must show "a reasonable probability that, but for his counsel's unreasonable failure to file a merits brief, he would have prevailed on his appeal"); *see also United States v. Mannino*, 212 F.3d 835, 844 (3d Cir. 2000) ("The test for prejudice under *Strickland* is not whether petitioners would likely prevail upon remand, but whether we would have likely reversed and ordered a remand had the issue been raised on direct appeal."). Therefore, petitioner need not, for example, show that after winning reversal he would have achieved a particular result in the district court on remand.[2] No *Nix* or

[2] At re-sentencing, petitioner will, however, also be able to show that under the correct application of the Guidelines, his guideline range should be lower, thereby reducing his actual sentence by six to twenty-one months. Because the government did not ask for an upward departure and the court sentenced petitioner near the low end of the sentencing range, if petitioner's sentencing range had been correctly set at 63-78 months, everything in the record suggests that petitioner's actual sentence would have been within this lower range at the time of the original sentencing.

Lockhart factors exist in this case to suggest that petitioner's claim was tainted or that he would obtain a windfall in granted relief from his illegal sentence. Thus, under *Strickland* and all its progeny, including *Nix*, *Lockhart*, and *Williams*, petitioner has established the requisite prejudice, which proves that his appeal was fundamentally unfair because of his counsel's error.

II. THE SEVENTH CIRCUIT "SIGNIFICANT PREJUDICE" TEST UNDERMINES CORE PRINCIPLES OF THE FEDERAL WRIT OF HABEAS CORPUS.

In addition to imposing an unwarranted second stage of inquiry in ineffective assistance of counsel cases, the Seventh Circuit further concluded that only unprofessional errors that "produce a large effect on the sentence," *Durrive*, 4 F.3d at 548, are sufficient to trigger the Sixth Amendment's protection. This holding finds absolutely no support in this Court's decisions, and in fact, is clearly contrary to both the plain language and jurisprudence of the federal habeas corpus writ.

Section 2255 of title 28, U.S. Code states that:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the

> sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

Obviously, a Sixth Amendment claim of ineffective assistance of counsel qualifies as a violation of the Constitution. Additionally, an improper guideline sentence violates both the "laws of the United States" and the "in excess of the maximum authorized by law" clauses of § 2255. Under 18 U.S.C. § 3551(a) and § 3553(b), a district court "shall" impose a sentence within the guideline range as determined by the Sentencing Guidelines. Thus, when a prisoner is erroneously given a sentence above the correct guideline range, his sentence is both illegal and in excess of the statutory maximum sentence permissible under law, that is, the Sentencing Reform Act of 1984. However, regardless of which of these three clauses of § 2255 is violated by this petitioner's sentence, § 2255's plain language could not be clearer about the action required. If a prisoner is in custody in violation of a provision of § 2255, a court must entertain the merits of the petition and "vacate, set aside or correct the sentence." Nothing in § 2255 authorizes a district court to engage in the Seventh Circuit's cost/benefit analysis that weighs the burden of litigating these claims on the courts against some arbitrary value placed upon the length of an illegal sentence. In fact, some of the courts of appeals have correctly concluded that prisoners can demonstrate

the requisite prejudice under *Strickland* even when a sentencing error resulted in no additional time but might have negative collateral consequences. *Jackson v. Leonardo*, 162 F.3d 81, 86-7 (2d Cir. 1998) (even though there was no actual effect on his sentence, the possibility of an enhanced sentence under a repeat offender statute if petitioner was convicted of a subsequent offense constituted sufficient prejudice under *Strickland*); *United States v. Palomba*, 31 F.3d 1456, 1464-66 (9th Cir. 1994) (similar).

The Seventh Circuit's significant prejudice test also undermines the central principles of equity, due process, and substantive justice that underlie the federal equivalent of the Great Writ of habeas corpus. The Court has held that an error in "the very duration of a [prisoner's] physical confinement" lies at the "core" of the habeas corpus writ. *Preiser v. Rodriguez*, 411 U.S. 475, 487-88 (1973). Nor can it be questioned that a prisoner's "substantial rights are affected if his prison sentence is longer than it should have been." *United States v. Granados*, 168 F.3d 343, 346 (8th Cir. 1999). It is also "beyond dispute that a sentencing calculation may violate the due process clause of the Fifth Amendment if there is a possibility that the sentence imposed may have been based on legal and/or factual error." *United States v. Mannino*, 212 F.3d at 846 (citing *United States v. Tucker*, 404 U.S. 443 (1972); *Townsend v. Burke*, 334 U.S. 736 (1948)). Moreover, the "Court has adhered to the principle that habeas corpus is, at its core, an equitable remedy." *Schlup v. Delo*, 513 U.S. 298, 319 (1995). If a defendant comes to a court with clean hands and a claim that merits relief under a statute, equity mandates that such relief be granted. The Seventh Circuit ignores these principles and trivializes petitioner's unlawfully lengthened prison term by reference

to even greater sentencing injustices. Such a comparison is an affront to yet another fundamental tenet of our criminal justice system – the principle of individualized justice. *See Stack v. Boyle*, 342 U.S. 1, 9 (1951) (Jackson, J., concurring) ("[E]ach defendant stands before the bar of justice as an individual.").

Without statutory or constitutional support, the Seventh Circuit's reformulation of the *Strickland* test and its requirement of "significant prejudice" rest capriciously on the court's explicit desire to limit post-conviction motions to correct sentencing errors. Its policy arguments, however, are based on a failure to recognize the status of the Sentencing Guidelines as "law" under § 2255, and ultimately, are founded on a cost/benefit approach to justice that is inconsistent with the core notions of liberty protected by the Sixth Amendment and Due Process Clause.

In *Durrive*, the Seventh Circuit claimed that "[b]efore the advent of the Sentencing Guidelines, no one would have dreamed that choices influencing the term of imprisonment within such a narrow range could be relitigated on collateral attack." 4 F.3d at 550. Nevertheless, the Sentencing Reform Act of 1984 and the United States Sentencing Guidelines did dramatically change sentencing decisions by bringing them into the light where they can be examined by appellate courts, both on direct appeal as provided by statute, *see* 18 U.S.C. § 3742, and on collateral review under § 2255. *See generally Mistretta v. United States*, 488 U.S. 361 (1989). While before the Guidelines, it was generally nearly impossible to determine how a slight error by counsel had affected a judge's broad

sentencing discretion under an indeterminate system, the Guidelines have limited a sentencing judge's discretion, such that, in some instances, the court does little more than execute a ministerial calculation. *See* Proposed Sentencing Guidelines for United States Courts, 52 Fed. Reg. 3920 (1987) ("Through commentary and specific guideline provisions, the Commission offers objective criteria to guide the exercise of structured discretion by the judge."); *see also United States v. Severson*, 3 F.3d 1005, 1013 (7th Cir. 1993) ("The Sentencing Guidelines brought a formulaic method to sentencing, eliminating much of the district court's discretion. . . . "); Kate Stith & Jose Cabranes, FEAR OF JUDGING 167 (1988) ("[I]n the typical case, the judge is supposed to perform an automaton's function by mechanically applying stark formulae set by a distant administrator."). Thus, in a discrete set of cases such as petitioner's, it is now possible to determine to an actual range of months, the impact that counsel's unprofessional errors had on a sentence.

The Seventh Circuit conflates these clear cut cases in which a legal error relating to the Sentencing Guidelines resulted in a demonstrable sentence increase with those cases involving factual determinations (*e.g.*, drug quantity) that are entitled to appellate deference. *See* 18 U.S.C. § 3742(e). Instead of recognizing that under the Guidelines there are now sentencing decisions with different levels of opacity, the Seventh Circuit lumps all these cases together to raise the specter that "almost any error at sentencing may be recast as a challenge to counsel" and that the "significant prejudice" test is necessary to prevent ineffective assistance of counsel claims from becoming "means of

vindicating on collateral attack all manner of arguments under rules and statutes." *Durrive*, 4 F.3d at 550.

It is on precisely this issue that the Fifth Circuit, which originated the "significant prejudice" test for indeterminate sentencing cases, rejected the Seventh Circuit's reasoning in *Durrive*. The Fifth Circuit wrote: "We qualified this significant prejudice rule in *dictum*: 'one foreseeable exception to this requirement would be when a deficiency by counsel resulted in a specific, demonstrable enhancement in sentencing – such as an automatic increase for a "career" offender or an enhancement for use of a handgun during a felony – which would have not occurred but for counsel's error.' " *United States v. Phillips*, 210 F.3d 345, 351 (5th Cir. 2000).

In any event, the Seventh Circuit's cost/benefit analysis places an inappropriate premium on the burden of collateral review of attorney errors at sentencing on the court system. Mr. Glover's petition is his first § 2255 motion and his first opportunity to present his ineffective assistance of counsel claim.[3] Thus, this is not a successive habeas petition to which the Court and Congress have erected additional barriers to relief. *See* Antiterrorism and Effective Death Penalty Act of 1996; *Felkner v. Turpin*, 518 U.S. 651 (1996). Nor is this an appeal from a state conviction for which the Court has enunciated restraints on federal review "grounded in concerns of comity and federalism." *Edwards v. Carpenter*, 529 U.S. —, 120 S. Ct. 1587,

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[3] Petitioner was represented by the same counsel at trial and on appeal. *See also Lonchar v. Thomas*, 517 U.S. 314, 330 (1996) (ineffective assistance claims "often cannot be raised on direct appeal").

1591 (2000) (quoting *Coleman v. Thompson*, 501 U.S. 722, 730 (1991)). Moreover, unlike in *Durrive* where the defendant complained about the court's failure to follow the procedures of Rule 32 to the letter, which might or might not have increased his sentence, there is no question here that petitioner is actually serving an illegal sentence, that is, a sentence in excess of that authorized by the Sentencing Guidelines and its enabling legislation.

Certainly, amici think it is useful to point out that the Seventh Circuit's floodgates argument overlooks the fact that many ineffective assistance of counsel cases never reach the prejudice prong because the defendant is unable to meet the exacting standard that counsel's performance was so deficient as to fall below prevailing standards of professional norms. More important, however, amici believe that the Seventh Circuit's blatant cost/benefit analysis offends basic notions of due process. While those on the front lines of the criminal justice system, and even at the level of the courts of appeal, may sometimes see themselves as performing triage surgery in an overburdened system, this Court cannot sanction rules that disregard fundamental injustices just to keep the cases moving. A term of imprisonment carries with it various kinds of intentional and unintended dehumanization, humiliation, and brutalization, for when a prisoner enters prison, "He is thrown into a violent whirlwind of moral, mental and physical destruction." Jack Henry Abbott, IN THE BELLY OF THE BEAST 111 (1981). *Cf. Thornburgh v. Abbott*, 490 U.S. 401, 407-08 (1989). Moreover, these dangers are present each and every year, month, day, and hour of prison time. As this famous prison memoir put it, "It hurts every day. Every day takes me

further from my life. And I am not even conscious of how my dissolution is coming about. Therefore, I cannot stop it." *Id.* 405.

In this case, a constitutional error has occurred. Nothing in this Court's jurisprudence supports the Seventh Circuit's misguided attempt to impose a vague cost/benefit approach that purports to weigh the value of additional days and months of incarceration upon Mr. Glover against the institutional costs associated with fully litigating a claim of ineffective assistance of counsel. In such a case as this, there cannot be "too much justice."

III. THE SEVENTH CIRCUIT "SIGNIFICANT PREJUDICE" TEST EXACERBATES A SIGNIFICANT PROBLEM IN THE REPRESENTATION OF FEDERAL CRIMINAL DEFENDANTS.

Amici contend that the Seventh Circuit's "significant prejudice" test camouflages rather than corrects serious issues concerning defense attorney competence that have arisen since the advent of the Sentencing Guidelines. Prior to the Sentencing Guidelines, indeterminate sentencing, that gave judges wide sentencing discretion, was the rule in federal criminal cases. *See Apprendi v. New Jersey*, 530 U.S. —, 120 S. Ct. 2348, 2358 (2000).

Congress moved from an indeterminate sentencing regime to the Sentencing Guidelines primarily in an attempt to improve fairness and to achieve a concomitant decrease in sentencing disparity. *Apprendi*, 120 S. Ct. at 2394 (O'Connor, J., dissenting); *id.* at 2396-400 (Breyer, J., dissenting). Achieving a reduction in sentencing disparity

could not come, however, without an increase in the transaction costs of sentencing decisions. Some costs are obvious. Pre-sentence reports are longer and more complex, as are many sentencing hearings, which deal with heretofore irrelevant specifics such as exact drug quantity or the degree of cooperation. Obviously, the direct appeal of sentences provided for by the Sentencing Reform Act of 1984 has increased the burden on appellate courts to deal with the intricacies of sentencing issues. Certainly, as well, the Sentencing Commission's efforts to write and constantly amend the Guidelines have been substantial.[4]

These transaction costs in turn created a ripple effect which increased the burden on the participants in the criminal justice system. Sentencing now takes place in a technical and constantly evolving environment. Formerly, defense counsel's role was essentially to marshal whatever facts might sway the court to exert leniency towards the defendant, often no more than an attempt to put a human face on their clients; the Guidelines now require of counsel technical expertise and constant vigilance to change to represent their clients competently. It is not an exaggeration to say that familiarity and facility with the Guidelines has become a significant part of federal criminal practice. *See United States v. Soto*, 132 F.3d 56, 59 (D.C.

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[4] Since the Guidelines were first published in 1987, the amendments and commentary now take up more room than the sentencing rules themselves. Mary Pat Flaherty & Joan Biskupic, *Despite Overhaul, Federal Sentencing Still Misfires*, Wash. Post, Oct. 6, 1996, at A21. In the 2000 edition, the current guidelines and commentary occupy 424 pages, while the amendments alone (Appendix C) comprise 612 pages.

Cir. 1997) ("Familiarity with the structure and basic content of the [Sentencing] Guidelines . . . has become a necessity for counsel who seek to give effective representation.") (quoting *United States v. Day*, 969 F.2d 39, 43 (3d Cir. 1992) (Becker, J.)).

However, while the Guidelines are technical, amici contend they are not too technical for criminal practitioners to understand. While sometimes difficult to work with, they are no more difficult than other regulatory schemes that attorneys are expected to master, such as the tax code. In fact, even within the criminal law, the complexity of, and interrelationships between, the Guidelines, the Sentencing Commission's commentary, and the appellate decisions interpreting the Guidelines are not significantly different from the statutes, administrative commentary, and court decisions that regulate electronic eavesdropping or the rules of evidence. What the Guidelines require from counsel is simply the same degree of preparation, diligence, and continuing education with which criminal defense attorneys, and indeed all practicing attorneys, approach the technical aspects of their chosen fields of procedural and substantive law. In other words, the Guidelines require competence and a commitment to take sentencing advocacy as seriously as all other areas of representation of a federal criminal defendant, or any other client.

The sad reality, however, is that some criminal defense attorneys have not made the requisite commitment to master the still relatively new sentencing landscape under the Guidelines. In addition, with hundreds of amendments and appellate court decisions interpreting the Guidelines, sentencing is now full of pitfalls for the

unwary practitioner. *See* Stith & Cabranes, FEAR OF JUDGING 128 (citing studies that reflect "significant variation in Guidelines competence among defense attorneys"); Mary Pat Flaherty, *Innocent Errors Add Years to Terms of Guilty Parties*, Wash. Post, Oct. 6, 1996, at A21 (detailing mistakes in sentences that survived the scrutiny of attorneys, probation officers, and judges and quoting federal public defender who spent three and a half years checking defendants' sentences to conclude that even math errors are made all the time.).

Thus, there is substantial evidence that not all defense attorneys have risen to the challenges presented by the Guidelines. The Seventh Circuit, with its "significant prejudice" test, seeks to sweep cases like Mr. Glover's under the rug – leaving no forum where his unlawful sentence or counsel's errors can be addressed. Such a situation is not only unjust, it is unhealthy for the criminal justice system. For the Guidelines to work as they were designed, competence and diligence are required from all participants in the federal criminal justice system. This is now apparent even to one of the Seventh Circuit judges who joined *Durrive* but who now believes (joined by two other Circuit Judges) that the "significant prejudice" test should be overturned. Compare *Durrive, supra*, with *Martin v. United States*, 109 F.3d 1177 (1996) (*per curiam*); *id.*, at 1179 (1997) (Rovner, J., dissenting from denial of rehearing en banc). In addition to criticizing the doctrinal foundation for the "significant prejudice" test, Judge Rovner writes that "[w]hat the court has effectively done, it seems to me, is to lower dramatically the quality of advocacy vis á vis sentencing

that will satisfy the Sixth Amendment. . . . [T]he defendant is entitled only to an attorney who does not overlook 'grave errors' having a 'large effect' on the sentence." *Id.* at 1184-85. Thus, rather than encouraging defense counsel (and other sentencing participants for that matter) to stay current on Guidelines issues and amendments, the Seventh Circuit rule reassures the weakest members of the federal criminal bar that "minor" errors resulting from incompetence or laziness will not even be reviewed.

Amici respectfully urge the Court to confront this issue and require the same competence from counsel on sentencing issues as the Court has done for other aspects of criminal representation – from factual investigation through trial and appellate work. So long as Congress believes that the Guidelines serve to reduce disparity and promote fairness in sentencing, the Court should insist that the criminal defense bar be held to a standard that ensures that defendants will serve the time the law requires but not a day more.

CONCLUSION

Because the Seventh Circuit has condoned the continued incarceration of petitioner for at least several months beyond the extent of the punishment permitted by federal law, despite its assumption that his sentence was the result of error of constitutional magnitude, the "significant prejudice" test should be overruled and this case remanded for further consideration and ultimately for resentencing.

Respectfully submitted,

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